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20

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW YORK REPORTS ISSUED DURING THE PERIOD COVERED BY THIS VOLUME.

BY ABBOTT BROTHERS,

COUNSELLORS AT LAW.

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ABBOTTS'

PRACTICE REPORTS.

NEW YORK.

MITCHELL *a.* MOUNT.

Court of Appeals; April Term, 1865.

SECURITY ON APPEAL FROM SURROGATE'S COURT.—EXECUTION ON JUDGMENT.—ACCOUNTING.

An order made by a surrogate granting leave to issue an execution against an executor, by 2 Rev. Stat., 116, § 21, cannot be reviewed on appeal unless the appellant gives security for the payment of the full amount directed to be levied, with interest and the costs of appeal.

It seems, that even if such security be given, the order cannot be reviewed in respect to the sufficiency of the assets.

The provisions of 2 Rev. Stat., 87, §§ 27, 28,—which prescribe the order of preference and payment of debts of a decedent,—and those of 2 Ib., 116, § 20,—which authorize the surrogate to allow a judgment-creditor to issue execution provided there are assets applicable to his demand,—are to be read and construed together, the former as a direction to executors and administrators as to the performance of their duty, and the latter as a remedy for a creditor in case of neglect; and the surrogate has power in a proceeding under the latter provisions to allow execution to issue where there are assets, unless it is made to appear that there are debts of the decedent entitled under the former provisions to preference over the demand of the creditor applying. The existence of such debts is not to be presumed.

If he who can and who ought to have explained himself clearly and plainly, has not done it when the occasion required, and opportunity was presented to him, he cannot be allowed to introduce subsequent restrictions which he has not at the proper time expressed.

A judgment not perfected until after the death of the debtor is not entitled to preference of payment under the statute.

The provisions last above referred to, which direct that upon an application for

leave to issue execution the surrogate shall require the executor or administrator to appear and account,—do not contemplate a settled or liquidated account, but only require such an accounting of the condition of the assets as will enable the surrogate to determine whether there is any property applicable to the debt in question. (DENIO, Ch. J., dissented.)

Appeal from an order of the Supreme Court, reversing, with costs, an order of the surrogate of the county of New York, granting leave to the plaintiffs to issue an execution on a judgment recovered by them against the respondent, an executor.

The decision on the order appealed from is reported, 17 *Ante*, 265.

The executor on appealing to the Supreme Court from the order allowing the execution to issue, gave a bond, with sureties, in the penalty of only $100, conditioned to prosecute the appeal with effect, and to pay all costs that might be adjudged against him in the Supreme Court.

W. R. Stafford, for the plaintiffs, appellants.

C. Tillotson, for the executor, respondent.

BY THE COURT.—POTTER, J.—This is an appeal from the judgment of the Supreme Court, in the first district, which reversed the order of the surrogate of the city of New York. In July, 1863, the appellants recovered a judgment against the respondent Mount in the Court of Common Pleas of the city of New York, for $1,261.76. Mount was sole acting executor of William B. Moffat, late of the city of New York, who died in April, 1862. Letters testamentary were issued to Mount, May 7, 1862. In September, 1863, Mitchell, one of the appellants, applied to the surrogate of New York for a citation, to be issued to Mount as such executor, to show cause why an execution should not issue against him as such executor for the collection of such judgment. The citation was issued. Mount appeared and accounted for the amount of the estate, by showing that $11,000 had come to his hands as the avails of the personal estate; that an amount of personal property amounting to about $27,715.17 was not yet available, by reason of its being under a lease; that the debts of the testator, unsecured by mortgage or other liens,

including the interest thereon, were about $42,000; that there was a large real estate, worth, over incumbrances, above $150,000, from the sales of a portion of which about $60,000 had been realized. Thereupon, the surrogate made an order granting leave to Mitchell and Cummings to issue execution, in due form of law, against the said Mount as executor, for the amount of said judgment, and interest. Mount appealed from this order to the general term of the Supreme Court, giving an undertaking in the sum of $100 on such appeal. The general term reversed such order of the surrogate, with costs, from which judgment an appeal is brought to this court.

It is so perfectly clear that the general term had no jurisdiction of the appeal in this case, that nothing further is required to be said after reading the provisions of the statute made for such purposes, which are as follows:

"Every such order shall be conclusive evidence, that there are sufficient assets, in the hands of such executor or administrator, to satisfy the amount for which the execution is directed to be levied; and no appeal shall be made from any such order, unless the person making the same shall execute to the plaintiff in such execution a bond with sufficient sureties, to be approved of by the surrogate, conditioned for the payment of the full amount so directed to be levied, with interest thereon, and the costs of defending the appeal, in case the order appealed from shall be affirmed." (2 *Rev Stat.*, 116, vol. 3, 5 ed., 204, § 22 [21].)

The bond in this case was in the penalty of $100, conditioned to pay the costs that may be adjudged against the appellant in the Supreme Court. The amount of the execution directed to be levied was $1,261.76. I am not aware of any repeal or modification of this statute, or of any of its provisions in this respect; none were claimed on the argument, or referred to on the briefs. The provisions of the statute are plain and clear. It is not allowable to interpret what requires no interpretation. Courts possess no power in such cases to give construction to it. The act speaks its own unambiguous, emphatic, unmistakable language, plain to the comprehension of every ordinary mind. This statute is not unconstitutional; its authority is above the power of courts, and is to be obeyed. When a statute is conceived in clear and precise terms, when the sense is manifest

and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it. (*Vattel*, B. 2.)

The section of the statute above quoted was enacted with especial reference to just such a case as the one before us. The first division of the section clearly intends to exclude from review by another court the question of discretion given to the surrogate in deciding as to the sufficiency of assets. It declares that his order shall be conclusive upon that point. No appeal therefrom can be brought to correct or reverse such decision. If, for any other reason than that of the sufficiency of assets, the surrogate has committed an error, then the second part or division of the section applies, which declares that no appeal shall be made for any purpose except upon condition of giving a bond in the form and containing the amount of security specified. This last division of the section is not to be construed as authorizing an appeal in relation to the question of discretion upon the question of sufficiency of assets. It must be some other question than that for which an appeal lies. The argument in this case, as well as the opinion of the general term, shows that the only error complained of is, that the surrogate erroneously decided in relation to the sufficiency of assets. This is error. The Supreme Court had no jurisdiction of the appeal upon that question. If we could be wrong in this view, the question of the sufficiency of the bond is fatal to the appeal. The condition upon which only an appeal can be taken has not been complied with. This was decided in Davies *a.* Skidmore (5 *Hill*, 503), per BRONSON, J. But such a statute needs no adjudication to sustain it.

If called upon to look at this case upon the merits, it presents a single question arising upon undisputed facts. Mitchell and Cummings had obtained a judgment against Mount, as such executor, for $1,261.76, after a trial at law upon the merits. This statute, entitled, "Of the Rights and Liabilities of Executors and Administrators," ought to be permitted to speak forth its own decision of the case. It provides (§ 20), "Where a creditor shall have obtained a judgment against any executor or administrator, after a trial at law upon the merits, he may at any time thereafter apply to the surrogate having jurisdic-

tion, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued."

"Section 21. The surrogate to whom such application shall be made, shall issue a citation, requiring the executor or administrator complained of, at a certain time and place therein to be named, to appear and account before him; and if, upon such accounting, it shall appear, that there are assets in the hands of such executor or administrator, properly applicable, under the provisions of this chapter, to the payment, in whole or in part, of the judgment so obtained, the surrogate shall make an order, that execution be issued for the amount so applicable."

Exactly what these sections direct was done. The executor rendered his account of the estate. He had been an executor above one year; he had $11,000 in his hands, avails of personal estate; in his account of the estate, and of the performance of his duties, he set up no claim that he had paid a single debt.

There was no claim that there was any debt that was by law entitled to preference, or that there was any amount of debts to be preferred, that would exhaust the $11,000, or any part of it; and although the whole debts of the testator would exceed the moneys in hand arising from the sales already made of personal estate, yet he showed to the surrogate in his account a large amount of real estate, more than sufficient, with the other personal estate not yet made available, to pay all the testator's debts, with the avails of $60,000 of the proceeds of the sales of real estate which had then been realized. The surrogate could see from such an account an abundance of means that could be ordered to be applied to debts, sufficient to pay all the testator's debts. Why, then, if it could be inquired into at all, should not the executor begin to pay? Should the court interfere, even if it had the power, with the exercise of judicial discretion of the surrogate? The Legislature intended to prohibit the interference. If they had not done so, it is for the want of power in the language they have employed. I think the Supreme Court are in error, when they say the surrogate had no authority to direct an execution for the payment of this judgment. The Supreme Court give two reasons as the basis of

their opinion. The first is, that the sections we have quoted would nullify the previous provisions contained in art. 2, 3 Rev. Stat., 5 ed., 174, § 31, which directs every executor and administrator to pay the debts of the deceased, according to a specific class or order. 1. Debts entitled to a preference under the laws of the United States; 2. Taxes assessed upon the estate of the deceased previous to his death; 3. Judgments docketed, and decrees enrolled against the deceased, according to the priority thereof respectively; 4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.

There are several answers to be made to this:

1st. The statute cited by the Supreme Court, by force of this same argument, also nullifies that which we have supposed controls this case: Which statute then is nullified? or, being equal, do they nullify each other? If both are not destroyed, which survives? The theory of the Supreme Court, in this regard, cannot be sound. One of these sections is not in conflict with the other, and does not, therefore, nullify the other; nor is such the rule of treating statutes in regard to their construction, even when they appear to be in conflict. The rule, as I understand it, is, that two statutes shall stand together, and both have effect, if possible, for the law does not favor repeal by implication, and it is never allowed, except where inconsistency and repugnancy are plain and unavoidable, and all acts in *pari materia* should be taken together as if they were one law.

There is no apparent inconsistency or conflict in the meaning or in effect between these two statutes. The statute cited by the Supreme Court is intended to be a direction to executors and administrators as to the manner of the performance of their duties, and it prescribes the order of preference to be observed by them in the payment of debts. This is its express object, and the executors and administrators, when they proceed to discharge their duty, are bound to obey this direction. Where debts are all of the same class, all are entitled to an equality in payment, whether it be entire or partial. Where the executor omits or refuses to perform this duty, then the other statute furnishes a remedy, and that is its object. The one prescribes a duty, the other furnishes a remedy in case of neglect. Instead of being in conflict, or the one nullifying the

other, they are in harmony and in aid of each other, and both are thus useful and necessary.

If a debt not in judgment is omitted to be paid, and the executor or administrator refuses to pay it, the creditor can, at any time after six months from the time of the granting of letters, make a like application to the surrogate (section 18 of the same statute, 2 *Rev. Stat.*, 116); a judgment-creditor can apply before the expiration of six months. (*Sec.* 20.) In the debts of the intestate, in the case before us, there was no debt having a preference over others. The appellant's claim, though it was in judgment, had no preference in this respect, because the judgment was not perfected previous to the death of the testator. If it had appeared in the accounts before the surrogate that there were debts entitled to preference, though it did not, and an order had been granted giving a lower order of debts in the rule of preference a priority in payment, this might have been the conflict which the Supreme Court supposed. No such thing, however, appeared. It was for the executor, when he was called upon to pay, and when called upon to account before the surrogate, or to show cause, to have interposed this legal excuse, if it existed, and such legal reason for declining to pay the surrogate would have been bound to regard. No such excuse was made. None is now claimed or pretended by the executor. It is a maxim, that "if he who can, and who ought to have explained himself clearly and plainly, has not done it when the occasion required, and opportunity was presented to him, he cannot be allowed to introduce subsequent restrictions which he has not at the proper time expressed."

It was error in the Supreme Court to assume, and to base their decision on the assumption of the existence of debts having right of preference of payment, not shown and not set up in the respondent's account, and therefore not in the case.

2d. The second error of the Supreme Court upon which they based their opinion is, that there must have been a settlement of the accounts of the executor, before the surrogate could make such an order. The statute requires no such thing, but provides to the contrary, nor is such the practice. (*Dayton's Surr.*, 2 ed., 336, 337.)

The meaning and intent of the word "account," as used in this 21st section of the statute, as explained by the statute it-

self, is such account of the condition of the assets as will enable the surrogate to determine whether there is any property applicable to the debt in question. It cannot be made to mean a settled or liquidated account, or an account then and there to be liquidated. The statutes relieve the executor from accounting and liquidation, until after one year from the time of taking out letters; that is, he cannot advertise for claims to come in until after six months, and the notice of publication must continue six months. Whereas, the account, like that in the present case, under the statute we have been considering, and upon which this case proceeds, is allowed to be demanded at any time after letters are issued. Obviously, therefore, the statute does not contemplate a settlement of accounts. If, on such an accounting as we suppose was intended by this statute, the executor should show that he had not been able to ascertain the amount of debts, or that there were debts which, by the statute, had preference in payment, that there was a doubt about the sufficiency of the assets, or means to pay all the creditors, or any other good reason, the surrogate would doubtless, in the exercise of a discreet judgment, have refused the order. Such a case was not presented to him. The surrogate did exercise his discretion, and if that question was submitted for review, we should say properly exercised it. But we have shown that discretion was not the subject of review; we have shown that the Supreme Court obtained no jurisdiction of the case, and that, if they had, they erred in their judgment on that review.*

I think the judgment of the Supreme Court should be reversed, with costs of that court, and of this court, and that of the surrogate be affirmed.

Denio, Ch.-J., dissenting. I am of opinion that the order of the surrogate was erroneous. An executor or administrator cannot be compelled to render a general account of his administration, nor can he do so at his own instance, until after the expiration of eighteen months from the time of taking out of letters. (3 *Rev. Stat.*, 178, 182, §§ 57, 77.) But, by another provision of the statutes, a creditor, without judgment, may

* Compare St. John *a.* Voorhies, *Post*, 53, where the decision of the Supreme Court is qualified and distinguished.

apply to the surrogate for an order for the payment of his debt, or any portion of it, after six months from the time of granting the letters. And, by still another section, a creditor who has obtained a judgment against the executor or administrator, after a trial on the merits, may apply for an order to show cause why an execution should not be issued. The surrogate in such case is to issue a citation requiring the executor, &c., to appear and account before him, and if it shall appear "upon such accounting that there are sufficient assets in the hands of such executor or administrator properly applicable under the provisions of this chapter, to the payment in whole or in part of the judgment so obtained, the surrogate shall make an order that execution be issued for the amount so applicable." (3 *Rev. Stat.*, 204, §§ 18, 20, 21, 22.)

The statute appears to contemplate that an estate may be so circumstanced that a particular debt might be properly paid, or a judgment satisfied, before the arrival of the period for final accounting, and without such final accounting being had, and such cases, doubtless, often occur. Where a creditor has obtained such a judgment, a provisional accounting is to be had, so far as to ascertain that the executor has the means of paying the particular debt, or a part of it, without prejudice to himself or any other creditor. If the affidavit of the respondent could be considered an accounting, it would appear that he had in his hands realized assets to less than thirty per cent. of the debts. If the funds received for real estate sold should be included, the amount would not pay a dividend equal to one half of the debts. But the sale of the real estate having taken place under an order of the Supreme Court, the executor was not obliged to account to the surrogate for these moneys. The judgment was not entitled to any priority in payment over the other debts of the testator, but in case of a deficiency was entitled to a *pro rata* rate.

It is only judgments and decrees rendered against the deceased in his lifetime that have a preference over simple contract-debts. If this judgment, therefore, should be paid in full, the judgment-creditors would obtain an unlawful preference over the other creditors, unless further assets, sufficient to pay all the debts, should afterwards come into the hands of the executor. The amount of the whole inventory, according to the

affidavit, is much less than the aggregate of the debts, and a considerable portion of the property was held under a lease for lives executed by the testator. But I am of opinion that the order was erroneous, because an account was not required or taken. The statutes require that the citation should be for the executor to appear and account. The citation actually issued did not allude to an accounting, but required the executor to show cause why execution should not issue, as though there was a judgment in the Surrogate's Court. As the executor appeared, the citation would be disregarded, if the subsequent proceedings had conformed to the statutes.

Again, there must be an accounting, before an order for execution; and then it can be issued only for the amount of assets applicable to the payment. The affidavit cannot be considered an account. Its purpose was to show that an account at that time was unnecessary.

I do not say that it was sufficient for that purpose, but if the surrogate determined it was not, he should have ordered an account to be presented, which should have been examined by the surrogate, and settled so far as to show that there were assets sufficient to pay the debts.

It is urged by the counsel of the appellant, that an appeal to the Supreme Court was never perfected, because a proper bond was not given by the present respondent when he undertook to appeal to that court. One of the sections already referred to declares that every order made under the preceding section shall be conclusive evidence that there are sufficient assets in the hands of the executor, &c., to satisfy the amount for which the execution is directed to be levied, and that no appeal shall be made from any such order, unless the appellant will execute a bond with sureties to pay the amount directed to be levied, if the order shall be affirmed. (§ 22.) The bond copied in the return in this case is the one required by 3 Rev. Stat., 1, § 26; 2 Rev. Stat., 1 ed., 610, § 108, which is applicable to appeals from all orders of a surrogate, except certain ones which are specified.

I am of opinion that as the order appealed from cannot be said to have been made under the provisions authorizing an award of execution upon a citation to account, and upon an accounting had, pursuant to such citation, the bond required in

such cases need not have been given. As the order was wholly unauthorized by the statute, it has not the effect which the statute attributes to such orders, and may be reviewed on giving the security required on appealing from orders, in respect to which the general provision applies. In Davies *a.* Skidmore (5 *Hill*, 501), it was held that the bond like the one given in this case was sufficient where the judgment upon which the surrogate had awarded execution was rendered by default, instead of a trial on the merits. It was thought that under 2 Rev. Stat., 1 ed., 88, § 32, a surrogate might direct execution to issue on any judgment.

I am not clear that this was correct, but am inclined to the opinion that the execution in that section has reference to the more detailed provisions which I have cited from a later title of the chapter. However this may be, the case is an authority to show that the special bond is not acquired, unless the order was made under these provisions, which was not the case as to the order appealed from.

I am for affirming the judgment of the Supreme Court.

Order reversed.

HINDS *a.* DOUGLASS.

Supreme Court, First District; General Term, February, 1865.

SECURITY FOR COSTS.—DISCONTINUANCE.

When a non-resident plaintiff fails to obey an absolute order to file security for costs, the court may grant a judgment of *non pros.*

Though the order for security was obtained on a motion by a part only of the defendants, the complaint may be dismissed as to all, on the plaintiff's failure to comply.

Appeal from order at special term.

Peter S. Woodbury and Earl Douglass, two of the defendants in this action, John Kelly, sheriff, being the third, moved for and obtained an order dated February 12th, 1862, that William

A. Hinds, the plaintiff, file security for costs, on the ground that he was a non-resident, which order was on appeal affirmed.

The terms of the order were as follows: "That the plaintiff file security for costs within twenty days after service of the copy of this order, or if an appeal be taken then within twenty days after the service of an order deciding said appeal, and that all proceedings of the plaintiff herein be stayed until such security be filed and the sureties justify, if excepted to, and that the defendants have $10 costs of this motion."

Upon an affidavit that more than twenty days had elapsed since service of the order of affirmance upon the appeal, and that no copy of any bond for security for costs had been served on the attorneys for the defendants who had moved for it, and that there was not time to serve notice of motion for the next motion day, and upon the clerk's certificate that no bond had been filed, the attorneys for all the defendants united in obtaining an order to show cause why the complaint should not be dismissed or judgment of *non pros.* entered.

After argument of the motion, an order was granted reciting the order for security and the plaintiff's failure to comply, and directing "that the defendants have judgment of *non pros.* in this action against the plaintiff, with ten dollars costs of the motion to be taxed with the costs in the action."

From this order the plaintiff appealed.

Gershom A. Seixas, for appellant.—I. In no case has the court power to dismiss the complaint, under the statute relative to security for costs. The only method provided by the statute is to stay all plaintiff's proceedings until security be filed and sureties justify. Sections 4, 5, and 6 of chapter relating to security for costs. Washburn *a.* Langley, 16 *Abbotts' Pr.*, 259.)

II. The order was improperly made as to the sheriff, since it nowhere appeared in the motion papers that plaintiff had been required to file security to the sheriff. The practice is well settled that defendant must first obtain an *ex parte* and alternative order requiring security to be filed within 20 days, or upon failure to show cause, &c. (Caldwell *a.* Manning, 15 *Abbotts' Pr.*, 271. The opinion in this case expressed that the practice of *non pros.* is retained, is *obiter dictum.*

III. The default was taken at General Term., Nov. 21, 1864.

The order of *non pros.* was granted upon three days' notice by order to show cause. If the order of *non pros.* stands, the plaintiff's remedy against defendant, Kelly, sheriff, is lost by statute of limitations. (§ 92 of *Code.*) The order appealed from should be reversed, if for no other reason than that of the statute not being peremptory. (13 *Abbotts' Pr.*, 473; 1 *Duer*, 705; 3 *Duer*, 613). It was a harsh and sudden exercise of discretion, and affects substantial rights of plaintiff's.

A. J. Vanderpoel, for defendant, Kelly.

F. H. Churchill, for the other defendants.

By the Court.*—Sutherland, J.—The practice before and since the Code in obtaining security for costs is correctly stated by Justice Barnard, in Caldwell *a.* Manning, 15 *Abbott*, 271. He also states correctly the practice before the Code, in case the security was not filed within a reasonable time after a peremptory order to file security.

There can be no doubt, I think, as to the power of the court to order judgment of *non pros.*, in case the security is not filed within a reasonable time after a peremptory order. For the court to do so, is perfectly consistent with the statutory stay of the plaintiff's proceedings.

That the court exercised this power before the Code, see Champlin *a.* Petrie, 4 *Wend.*, 209; Glover *a.* Cumming, 12 *Wend.*, 295.

There is nothing in the Code taking away or affecting this power of the court.

There could be but one bond, and this must be for the benefit of all the defendants. I think the motion was properly made for, and granted as to all of the defendants.

The order should be affirmed with $10 costs.

* Present—Ingraham, P.J., Sutherland and Clerke, JJ.

NIVER *a.* NIVER.

Supreme Court, Third District; General Term, December, 1864.

EXECUTION AGAINST THE PERSON.

An execution against the person of the defendant may be issued in an action the gravamen of which is wilful injury to the plaintiff's property, although the complaint demands an adjudication upon the construction of the will under which the plaintiff claims, where it does not appear that any doubt exists as to the construction, nor that the defendant acted under a claim of right.

Appeal from an order refusing a motion to set aside an execution.

This action was brought by Elizabeth Niver against David M. Niver. The substance of the complaint is stated in the opinion.

An answer was interposed denying all of the allegations of the complaint, except the will and the relations of the parties. The cause was referred to a referee to hear and decide, who reported in favor of the plaintiff for $50 damages and costs, and granting the relief prayed for in the complaint, restraining and enjoining the defendant as prayed for, &c. Judgment was entered accordingly, and the plaintiff issued execution against the person of the defendant for damages and costs, which the defendant moved to set aside. The motion was denied at special term, and the defendant appealed.

A. B. Voorhies, for the appellant.

Ira Shafer and *J. Lawton*, for respondent.

BY THE COURT.*—PECKHAM, J.—The motion is made upon the ground that the defendant is not liable to be imprisoned upon an execution in this case. The complaint is for a wilful and wrongful injury to plaintiff's property, which she obtained under the will of her father, and for wrongfully and wilfully

* Present—PECKHAM, MILLER and INGALLS, JJ.

depriving her of the use of certain parts of such property. The complaint sets forth the will of her father, the injuries complained of, and then asks that the rights and interests of the parties to this action under said will (the defendant, her brother, being a devisee therein), may be adjudged and determined; that the defendant may be required to remove certain obstructions he had interposed to her proper use of her property; that an injunction be issued against him enjoining him from interfering therewith, and for judgment for an injunction, and for damages to $500 for the said injuries, &c.

The complaint sets up no alleged doubt or difference between the parties as to their true rights under said will; it presents no question of doubt, and it makes no allegation that the defendant did what he did, under a claim or pretence that he had the right so to do under said will; on the contrary, all the allegations on that subject are that he did the wrongs wilfully, wrongfully, and illegally.

The gravamen of the action is the wrongs done to the plaintiff's property. There is but one count, and that asks redress for past wrongs and protection for the future. Lambert *a.* Snow, 17 *How.*, 517, has no application to such a case. There, there were two distinct causes of action, for one of which the defendant could be held to bail, and not for the other. Here are no two causes of action. The action is substantially for injuries, wilful injuries to plaintiff's property. Nor have the other cases cited by defendant's counsel any legitimate bearing here. (32 *Barb.*, 83; 1 *Hill*, 225; 7 *do.*, 182; or 2 *Cow.*, 262.) This case comes within the plain provision of the Code, § 179, for injuring property.

The order appealed from is affirmed, with $10 costs.

Order accordingly.

RIGNEY *a.* TALLMADGE.

Supreme Court, First District; General Term, February, 1865.

EXECUTION.—JUDGMENT IN CREDITOR'S SUIT.

In a creditor's suit brought by the plaintiff on behalf of himself and others who may come in, the plaintiff cannot, after judgment and the appointment of a receiver to collect the debtor's assets and apply them to payment of the various creditors, issue execution on the judgment. The receiver alone can enforce the judgment.

Appeal from an order of the special term vacating an execution issued by the plaintiff's attorney, and also a levy made thereunder on certain real estate by the Sheriff of Albany County.

The action was brought by Rigney, in behalf of himself and all other creditors of certain alleged insolvent partnerships, who should come in and contribute to the expenses of the suit, to set aside a sale and assignment of property of the firm to the respondent Tallmadge. The cause was tried at Special Term before Justice Sutherland, and judgment rendered for the plaintiff. Rigney's individual claim was only for $279.19, for which he had previously obtained a judgment; but the judgment in this action was for $20,586.77, as it involved the claims of all the creditors of the partnerships, and appointed a receiver to collect and disburse this amount *pro rata* among these creditors. In addition, the judgment provided for the payment to Rigney of his costs, amounting to $86.77.

Upon this judgment Rigney's attorney of record issued several executions against Tallmadge's property, under which certain portions of real estate were sold by the sheriff, amounting to $19,800, which he bought in himself. On May 23, 1864, he issued another execution to the Sheriff of Albany County against Tallmadge's property for $25,484.04—the whole amount of the judgment—whereupon the sheriff levied upon and advertised for sale certain real estate in his county. Tallmadge then moved at Special Term, before Mr. Justice Barnard, to set

aside and vacate this last execution and levy for irregularity, which motion was granted. From the order granting the motion Rigney appealed.

Wm. C. Hornfager, for the appellant.—I. The execution was warranted by the judgment, and there was no other way in which it could be enforced. (Fassett *a.* Tallmadge, 14 *Abbotts' Pr. R.*, 188, *and notes.*

II. The plaintiff's attorney was the proper person to issue the execution, as he represented not only the plaintiff, but all those who came in and contributed to the expenses of the action.

III. The execution was regular in form. If any amounts had been previously collected, they could be applied in extinguishment of the debt; but the judgment on the record appeared to be wholly unsatisfied, and the order should be reversed.

Elbridge T. Gerry, for the respondent.—I. The judgment in this action specified the amount of assets to which Rigney was entitled, and did not confer on him or his attorney the right to enforce payment to him of any larger sum. (1.) The only power remaining in Rigney's attorney was to isue an execution on his original judgment for $279.19, its amount. (2.) There is no rule or principle by which a judgment-creditor for a trivial amount may, after judgment in his favor in a suit in equity to set aside a transfer of property of his judgment-debtor as fraudulent, worth over $20,000, issue an execution for the full value of the property, when his original claim is only a hundredth part of the amount. (3.) Besides, this suit was brought for the benefit of *all* the creditors, and Rigney could not, because nominally plaintiff, obtain a preference over others equally entitled with himself to share in the assets. (2 *Van Santo Eq. Pr.*, 129, 147, 158.) (4.) And further, the papers show previous speculations by Rigney's attorney in these assets to the amount of $19,800; nothing of which is credited on the judgment, but execution is issued as if the whole was unpaid.

II. As matter of law, the receiver appointed by the judgment alone could enforce it as the chosen officer of the court; and Rigney's attorney had nothing to do with it. (1.) The property of the judgment-debtor, no matter by whom held, was the property of the receiver, and as such not liable to levy and

sale under execution issued by an individual creditor. (Green *a.* Bostwick, 1 *Sandf. Ch. R.*, 185; Mann *a.* Pentz, 2 *Ib.*, 257; Storm *a.* Waddell, *Ib.*, 494, 505; Idding *a.* Bruen, 4 *Ib.*, 424; Albany City Bank *a.* Schermerhorn, 1 *Clarke Ch. R.*, 297; West *a.* Fraser, 5 *Sandf.* S. C. R., 653; Wilson *a.* Allen, 6 *Barb.*, 542; Porter *a.* Williams, 5 *Seld.*, 142.) (2.) The execution in question was an attempt to get money adjudged to be paid to the receiver into the hands of Rigney's attorney, in clear violation of the rule that such attorney must not be the attorney for the receiver. (Ryckman *a.* Parkins, 5 *Paige R.*, 543; Matter of Ainsley, 1 *Ed., Ch. R.*, 576; Ray *a.* Macomb, 2 *Ib.*, 165; Warren *a.* Sprague, 11 *Paige R.*, 200; S. C., 3 *Leg. Obs.*, 122; *Edwards on Receivers*, 110.)

III. The order should be affirmed, with costs.

CLERKE, J.—The issuing of the execution was inconsistent with the whole tenor of the judgment. The receiver acquired title to all the property conveyed to Tallmadge; he alone can enforce the judgment.

The order should be affirmed, with costs.

INGRAHAM, P. J.—I concur, on the ground that execution should not have been issued by the plaintiff for his use, and that the receiver should have applied to the court for leave to issue execution.

THE TROY CITY BANK *a.* BOWMAN.

Supreme Court, First District; General Term, February, 1865.

COMPLAINT ON FORECLOSURE OF COLLATERAL MORTGAGE.—UNCERTAINTY IN BOND.

In an action brought to foreclose a mortgage, given to secure a bond made by one of the mortgagors and his partner, to secure the payment of certain notes, which notes were held by the mortgagees as collateral security for an indebtedness past due, it is not necessary that the complaint should allege that the notes held as collateral security had become due. A failure to comply with the condition of the bond makes out a sufficient cause of action.

The Troy City Bank *a.* Bowman.

A bond conditioned for the payment of a specified sum, or so much thereof as shall remain unpaid on certain notes held by the obligees after the application of all moneys received thereon, or on collaterals held by them, is not void for uncertainty.

Appeal from a judgment.

This was an action brought to foreclose a mortgage, made by the defendants, Samuel S. Bowman and Sarah his wife, as collateral security to a bond given by Samuel S. Bowman and Felix A. Finn, who were partners, under the firm of Samuel S. Bowman & Co. The bond was given to the plaintiffs for having discounted notes which were held and indorsed by Bowman & Co. Bowman and his wife, subsequent to making the mortgage, conveyed the premises to the defendant Callaghan, subject to the mortgage, who assumed to pay the same.

The complaint, after alleging the incorporation of the plaintiffs, stated that Morris S. Samuel & Co. made from time to time their promissory notes payable to the order of Bowman & Co., describing the several notes, and alleged that "the said Samuel S. Bowman & Co. endorsed said promissory notes, and the same so endorsed were respectively delivered to and discounted by these plaintiffs before the same became due; that these plaintiffs ever since have been and still are the lawful owners and holders of the said notes; that when the same respectively became payable they were duly protested for nonpayment, of which due notice was given to said endorsers, and that the said notes still remain due and unpaid." The complaint further stated the total amount due upon the notes as $9,985.91; and that Bowman & Co., to secure the plaintiffs against any loss on such notes, delivered to the plaintiffs certain other notes made by other parties, as collateral, "the net proceeds of which, when collected, were to be applied to the payment of the above-mentioned notes endorsed by the said Samuel S. Bowman & Co. And as a further collateral security to the plaintiffs for the payment of the said notes endorsed by the said Bowman & Co.," they gave their bond conditioned for the payment of $7,317.14, "or so much of said sum as shall remain unpaid on the notes of Morris S. Samuel & Co., endorsed by Samuel S. Bowman & Co., after the application to the payment thereof of all the net moneys received from the makers of said

notes or the collaterals accompanying the same, as follows, namely: One-third in twenty-four months, one-third in twenty-seven months, and one-third in thirty months, together with the interest on the amount due at the rate of seven per cent. per annum, payable semi-annually." And as collateral security for the payment of the said indebtedness, the defendants, Samuel S. Bowman and Sarah S., his wife, on the same day gave to the plaintiffs the mortgage in suit.

The substance of the mortgage, the conveyance by the mortgagors to Callaghan, and the interests of subsequent incumbrancers, and the fact that no proceedings at law had been had for the recovery of any part of the sum secured by the bond and mortgage, were alleged in the usual form, and the demand of relief was for the usual decree of foreclosure and sale and judgment over for deficiency.

The cause was tried upon the issues raised by the defendant's answer, at a special term before Mr. Justice Mullin. The counsel for the defendant moved upon the pleadings to dismiss the complaint as not stating a cause of action, which motion was denied.

Among other evidence was the receipt given by the plaintiffs for the mortgage in suit, which enumerated the notes of third persons held as collateral, and contained the following clause:

"And upon the receipt of said money, the same is to be credited upon said note and bond and mortgage, and the said Samuel S. Bowman and Felix A. Finn are to be held responsible only for any deficiency in the same, and the same is to be paid according to said bond and mortgage. Upon the payment of the same by the said Samuel S. Bowman and Felix A. Finn, the notes or judgments unpaid against the said Morris L. Samuel & Co., or the notes of, or judgment against any persons who are reliable on said collections, shall be forthwith assigned to Samuel S. Bowman and Felix A. Finn, and in the meantime no suit shall be brought against the said Samuel S. Bowman and Felix A. Finn or Samuel S. Bowman & Co., and the bond and mortgage to be cancelled."

At the close of the evidence the defendant's counsel moved for judgment upon the proofs, and also upon the pleadings, upon the ground that the bond was absolutely void on its face

for uncertainty; that it provided no period at which it should be paid, and that no case was proved.

The court found that the notes delivered by Samuel S. Bowman & Co. to the plaintiffs, as collateral security for the payment of the said notes of Morris L. Samuel & Co., were returned to said Samuel S. Bowman at his request, on the 30th day of April, 1858, with the exception of two notes made by McSpedon & Baker, which are now in suit, and the notes of two parties which have been paid, and which were credited on the amount of the said notes of Morris L. Samuel & Co., held by the plaintiffs before said bond and mortgage were given, excepting the sum of $87.50 since paid. The court granted to the plaintiff the relief demanded in the complaint.

The defendants, the Bowmans and Callaghan, excepted to the decision, and judgment having been entered, appealed to the court at general term.

S. Sanxay, for the appellants.—I. The defendants were entitled to their motion of judgment of dismissal of the complaint. (*Code*, § 148.)

1. The complaint did not state facts sufficient to constitute a cause of action for the foreclosure of the mortgage, or otherwise.

2. The mortgage was executed by Bowman and his wife without any consideration moving to them; but only as a collateral security for a bond made by Bowman & Co., composed of Samuel S. Bowman and Felix A. Finn, who were, *quoad* Bowman and wife, third parties; which was, in itself, given as a collateral security for the payment of certain notes made by certain other parties whose names are not stated; nor are the amount, dates or time of said notes given; nor is it alleged that the same had become due, or were unpaid, or how much was due upon said notes, if any thing.

3. The bond to secure which said mortgage was given, though for a stated sum, was in truth for a conditional and uncertain amount, depending upon the contingency of the collection of certain notes, and of the application of the amount thereof when collected, and was to be available only for the balance that might remain due after such application of such collections, if any thing.

4. There is no allegation that any of said notes had become due, or what had become of them.

II. The bond which the mortgage was given to secure, was void, for uncertainty. It is uncertain in amount and time when payable, and can only be made certain by extrinsic facts, which are entirely omitted to be stated, even if they exist. The statement of a conclusion of law is not sufficient. The statements may all be true, and yet the notes and collaterals may not be due, or may have been passed away or transferred, &c. No fact is stated from which any conclusion can be deducted that the bond is due, or that any sum whatever is due upon it.

III. The defendants were entitled to judgment when moved for.

1. The receipt read and put in evidence was part of the transaction whereby plaintiffs acquired the mortgage; and that paper qualifies the bond and mortgage, and amounts to an agreement not to sue, and, of course, not to foreclose the mortgage.

2. The same also limits the amount that may, by possibility, become due upon the bond and mortgage, and provides for a condition of things when nothing whatever may become due thereon, and when the same are to be cancelled.

3. It is also shown that two of the notes, amounting to $4,500 and upwards, are still in the process of collection, and secured; and which notes, when and if collected, are to be credited upon the bond and mortgage. It is clear that no proceedings at any rate, could be taken upon the bond and mortgage until the determination of the question whether those are to be collected or not.

4. It also appears that the plaintiffs have converted certain of the collateral notes for which the bond and mortgage were given as collateral, and for which notes, so converted, no credit is given upon the bond and mortgage.

E. L. Fancher, for the respondents.—I. By the condition of the bond and mortgage, the principal sum of $7,317.14, or the amount remaining unpaid on the notes of Morris L. Samuel & Co., was made payable as follows: one-third in twenty-four months; one-third in twenty-seven months; and one-third in

thirty months from that date, with interest on the amount due at seven per cent.

II. The amount due on the notes, being more than the sum of $7,317.14, specified in the mortgage, and interest, the plaintiffs recovered that specified sum only, and interest on it, as the amount due under the bond and mortgage, after crediting whatever had been received; and the judgment was entered accordingly. To this certainly the defendants cannot object.

III. The collateral notes, amounting to $813 were properly surrendered to Samuel S. Bowman & Co., no one having any interest in them, except that firm, at the time of such surrender, which was prior to the deed to Callaghan.

IV. Plaintiffs have the right to retain the security of the remaining collateral notes,—*i. e.*, the two notes of McSpedon & Baker, and the one note of Glatz, and the judgments upon them, until their debt shall be paid, and are not bound to surrender them to any one.

When the plaintiffs are fully paid, Samuel S. Bowman & Co. will be entitled to an assignment of the judgment on the Glatz note, and their creditor, D. R. Martin, to whom they have assigned the McSpedon & Baker notes, and judgments thereon, will then be entitled to an assignment of those judgments.

V. Defendant Callaghan will not be entitled to those assignments, he having assumed the mortgage of $7,317.14, and interest; but even if he pretends to be thus entitled, he cannot object to the plaintiff's foreclosure of the mortgage, it being past due. Nor has he objected, not having answered the complaint.

By the Court.*—Clerke, J.—There is no force whatever in the objections taken by the defendant's counsel in his two first points. The complaint sets out the indebtedness clearly, and that the mortgage in question was given to secure the payment of a bond, by which the time for the payment of this indebtedness was considerably extended. It also shows that Bowman and Finn have failed to comply with the conditions of the bond. These facts surely constitute a sufficient cause of action.

* Present, Clerke, Ingraham, and Sutherland, JJ.

As to the assertion that the bond was void for uncertainty, as the case contains no copy of it, we can only be guided by what the complaint states it to be. The amount is distinctly stated, as well as the periods at which it is payable. Besides, it would not be void for uncertainty, if it could be made certain by extrinsic facts. *Id certum est, quod certum reddi potest.*

The defendant Bowman certainly has no right to complain of the surrender of some of the collateral notes to him; as to the remaining three notes retained by the plaintiffs, they have a right to retain them until their debt shall be paid. This was the agreement, and they are under no obligation to surrender them.

The stipulation in the receipt contains no promise on the part of the plaintiffs not to bring an action to foreclose this mortgage, when the time of payment mentioned on the bond has elapsed. The clause referred to means, that until the expiration of that time, no suit shall be brought.

The judgment should be affirmed, with costs.

WAKEMAN *a.* DICKEY.

New York Common Pleas; Special Term, March, 1865.

INTERPLEADER.—INJUNCTION.

An action to compel defendants to interplead cannot be sustained where the plaintiff claims a portion of the fund in dispute.

In such a case an injunction restraining the defendants from their actions against the plaintiff cannot be sustained.

Motion to dissolve an injunction.

This was a suit for an injunction against the defendants, restraining them from bringing suits against the plaintiffs, and for an order of interpleader. The complaint set forth that the plain-

tiffs, Abraham Wakeman and John D. Latting, were employed by one of the defendants, Gilbert N. Marshall, to defend a suit, in which they recovered for him a judgment which, with the costs and costs of appeal exceeded $700; that during the pendency of the action, said Marshall having become insolvent, had assigned the claim, but had subsequently re-purchased it, having in the meantime been admitted to practice as an attorney; that he had demanded from the plaintiffs a substitution, which they offered to give on payment of their costs, and that he had, on his part, offered to pay a certain sum as costs on being substituted as attorney; that the plaintiffs had agreed to accept that sum, but Marshall had failed to pay it, and having failed in two motions to compel a substitution until he should fulfill his offer, had stated to the plaintiffs that he had assigned the judgment to the defendant, P. J. Dickey (who was an attorney sharing his office), and had advised said Dickey as his attorney that he was not bound by any offers made by him, or by the orders made in the matter, and that unless the plaintiffs acceded to his demands, further steps would be taken; that subsequently Dickey informed the plaintiffs that Marshall had purloined or stolen the assignment of the judgment, and notified them that he was the sole owner, and not to pay the same to Marshall; that Marshall had called upon them and stated that Dickey's claim was ridiculous and preposterous, and notified them that he should hold them legally accountable for the proceeds of the judgment; that the defendants were both insolvent and irresponsible; that plaintiffs had offered to pay the balance after deducting their costs and counsel-fees to either who would give them proper indemnity, and had finally deposited the balance in the United States Trust Company; that Dickey had commenced and Marshall had threatened suit for the money. And the complaint then prayed, that after deducting their costs and counsel-fees, they might have leave to pay the balance into court wherein the defendants may litigate their respective claims; that the plaintiffs might be discharged from liability, and the defendants enjoined from prosecuting the defendants.

A temporary injunction having been granted, the defendants now moved to dissolve the injunction.

Wm. J. Huff, for the defendant Dickey.—I. The plaintiffs

are not entitled to maintain an action of interpleader, nor to have said injunction-order continued.

(*a.*) They do not show that they are not colluding with the defendant Marshall against the defendant Dickey. (2 *Story's Eq. Juris.*, §§ 809 and 812; Beck *a.* Stephani, 9 *How. Pr.*, 197.)

(*b.*) The amount in controversy is uncertain. The plaintiffs claim a lien for services, the amount of which is a matter in dispute. (Finley *a.* American Exchange Bank, 11 *How. Pr.*, 468; Chamberlain *a.* O'Connor, 1 *E. D. Smith*, 665.)

II. The alleged claim of the defendant, Marshall, is one in which said Marshall is estopped from setting up any claim to the moneys in controversy. (Dezell *a.* Odell, 3 *Hill*, 217.)

III. The plaintiffs by their own papers show that Marshall stated that defendant Dickey was owner of the judgment, and from that time plaintiffs acted as the attorneys for defendant Dickey, and he being their client, they are not to notice the rumors of every individual.

T. B. Wakeman, for plaintiffs.—I. The authorities cited by counsel for Mr. Dickey do not apply, because this is not a bill of interpleader,—certainly, not one between a client and a stranger, as he supposes.

Both the defendants claim to be clients by the same contract or privity with the plaintiffs, and, therefore, the plaintiffs are utterly unable to determine which party they should account to.

Interpleader would lie in such a case if the amount of the fund was certain. (*Story's Eq. Jurispru.*, § 812.)

If the plaintiffs could find out who their client really is, they would settle with him and claim that as protection, under Marvin *a.* Ellwood (11 *Paige*, 366).

II. But this is not a regular bill of interpleader. It is an equitable action to ascertain the rights of the plaintiffs in the fund collected by them, and to restrain irresponsible defendants from doing them an irreparable injury while that is being done. There is nothing to interplead about until their costs and fees are ascertained and deducted. If the parties then want another action in order to get the balance paid into court, it may be necessary to commence one.

III. The injunction should be sustained, because, otherwise,

the plaintiffs are certain to be deprived of their first costs and fees, to be subjected by another action by Marshall to costs and liability to pay the claim again, and thus molested and injured without remedy.

This is plainly by (*Code*, 1, 2, § 219), a case for injunction. Mr. Dickey is ready to enter judgment as soon as the injunction is dissolved. Mr. Marshall is not and cannot be a party to that suit, and the jurisdiction of the Marine Court is so small that the plaintiffs, even as to Mr. Dickey, cannot recover the amount of their bill, which exceeds $500. Gross injustice will be done to all parties by allowing that suit to proceed, and particularly to the plaintiffs.

IV. The plaintiffs have no other remedy than that asked in this action.

A motion in the original suit would not avail, because it was ended in the Court of Appeals; besides, Mr. Dickey was not a party to it, nor could an injunction by motion be had against him.

Nor would a cross-action in any other court or other form avail, because Mr. Dickey's action is ready for judgment; and, further, as the plaintiffs have the moneys, how could they recover them of the defendants?

CARDOZO, J.—The plaintiffs are undoubtedly in a predicament, and I should be disposed to protect them if I could see any way of doing it legally.

They have collected a demand, and are called upon by two persons, both irresponsible, each claiming to be solely entitled to it, and for aught I can see, plaintiffs are in the position of any other gentlemen, who without legal right, are sued by insolvent people. If the plaintiffs made no claim to the fund, this complaint might be sustained as a bill of interpleader, and the injunction be continued. But the difficulty is that the plaintiffs want to retain out of the fund their compensation for their services, and while the holder makes any claim to the money, he cannot have the other claimants interplead. This is the relief asked in the complaint. Indeed, I do not see what other relief could be asked.

I am very reluctant to dissolve this injunction under the circumstances, but I do not see how it can be lawfully continued.

After writing the above, I determined, on account of the hardship of the case, and my desire to sustain the injunction if practicable, to confer with Judge Brady, who granted the temporary injunction, and after very careful examination we have both concluded that it is impossible, consistently with well established rules, to sustain the order.

Judgment dissolved, without costs.

LIVINGSTON *a.* PAINTER.

Supreme Court, First District; General Term, February, 1865.

ACTION FOR SPECIFIC PERFORMANCE OF AGREEMENT TO PAY OFF PART OF MORTGAGE.

Where an agreement was made between the holders of the first and second mortgages, respectively, upon leasehold property, that the holder of the first mortgage would waive a default, which gave him the right to foreclose it immediately, in consideration that the holder of the second would foreclose his mortgage immediately, and that if he should buy at the foreclosure he would pay the sum of $3,000, on account of the first mortgage within six months;—*Held*, that the holder of the first mortgage could sustain an action against the holder of the second mortgage, and a third person in whose name he was alleged to have bought in the premises at such foreclosure, to have such purchase set aside so far as it prevented specific performance of the agreement; and to have the holder of the second mortgage adjudged to pay the plaintiff $3,000 upon account of the first mortgage.

Appeal from an order dismissing a complaint upon the trial.

This was an action brought by Robert J. Livingston against Jane A. Painter, administratrix, &c., and one Boyes, to obtain the specific performance of an agreement.

The plaintiff alleged an agreement between one Hamilton, the assignor of the plaintiff, and defendant Painter, who was the owner of a second mortgage of a leasehold (No. 84 Leonard-street), which mortgage was made by one Seabury Lawrence to

one John Sniffen and others, to secure the payment of $12,340. The agreement recited that Painter had commenced proceedings to foreclose this mortgage; that Hamilton, the assignor of the plaintiff, was owner of a first mortgage, made by the said Lawrence on the same premises, to secure the payment of $12,000, which had become due at the option of Hamilton, according to a provision in the mortgage; but that he had agreed to waive this option, and that Painter, in consideration of the sum of one dollar, and of the agreement made by Hamilton, agreed,—1st. To pay within forty-five days the semi-annual interest in arrear on said first mortgage, and all taxes and assessments due upon the premises; 2d. To procure the foreclosure of the second mortgage to the earliest possible conclusion; and, 3d. In the event of Painter's buying in his own name, or otherwise, at the sale under the said foreclosure, the said leasehold interest subject to the first mortgage, he should reduce the same by payment, on account, of the sum of $3,000, within six months from the date of the agreement.

The complaint alleged that Painter prosecuted the foreclosure of the second mortgage to judgment of foreclosure and sale; that under this judgment the leasehold was sold at public auction; that the same was purchased at the sale by the defendant Boyes for $2,000, and that the sheriff executed a deed thereof to Boys, subject to the first mortgage.

The complaint further alleged that Painter purchased the leasehold at the said sale, in the name of Boyes, for the purpose of evading the terms of said agreement, and that Painter was really the owner of the beneficial interest in the said purchase.

On the trial of the cause at special term, the defendants moved to dismiss the complaint, on the ground that it did not present a case for the equitable interposition of the court; which motion the court granted, holding that although it is not essential to granting specific relief that the subject of it must be real property, yet it should not be granted in such a case as this; for although the plaintiff hereby would not be permitted, under his agreement, to foreclose his mortgage immediately, if the defendant should tender the $3,000; still, the mortgage being as effectual as ever, and the only injury sustained by

him being his delay in prosecuting its foreclosure, his remedy must be by an action for damages.

From this judgment the plaintiff appealed.

Lewis L. Delafield, for the appellant.

R. M. Harrington, for the respondents.

By the Court.*—Sutherland, J.—The agreement of Painter, the holder of the second mortgage, if he bought "in his own name or otherwise," at the sale under the foreclosure of his mortgage, that then he should and would reduce the principal sum secured by the first mortgage (held by Hamilton as executor, &c.), by paying on account of the same $3,000, was a lawful and valid agreement, for a sufficient and lawful consideration; the consideration being the agreement of Hamilton to waive his option of considering the whole principal of his mortgage due and payable for non-payment of interest; and Painter avers in his answer that Hamilton in fact waived his option to consider the whole principal due, by actually, soon after the making of the agreement, receiving from him the interest. It is easy to see that this waiver by Hamilton of his right to foreclose his mortgage for the whole principal and interest might be, and probably was very beneficial to the holder of the second mortgage.

The complaint alleges in substance, that on the sale under the foreclosure of Painter's mortgage, the defendant Boyes purchased the mortgaged premises or interests, and took the sheriff's deed in his name, at the instance and for the benefit of Painter, and with full knowledge of the agreement between Painter and Hamilton, for the purpose of enabling Painter to evade the agreement; and that Boyes paid no money, but gave a mortgage to Painter for the whole amount of the purchase-money.

The specific relief asked by the complaint is,—1st. That the sheriff's deed to Boyes he declared fraudulent, inoperative, and void, so far as it prevents the specific performance of the agreement by Painter to reduce the principal of the first mortgage

* Present, Ingraham, P. J., Clerke and Sutherland, JJ.

by paying the $3,000 on account thereof; 2d. That the defendant Painter be adjudged to reduce the principal of the mortgage by paying the $3,000 on account thereof. The complaint also asks for general relief.

It is plain, I think, that the complaint shows a *prima-facie* right in the plaintiff (Hamilton's assignee) to come into a court of equity, at least, for the purpose of obtaining the relief first specifically asked for; and if so, it is perfectly clear that a court of equity having jurisdiction for such purpose could proceed and give the relief secondly specifically asked for, though the plaintiff might have obtained such last-mentioned relief in a court of law.

But I do not see how the plaintiff could have obtained this relief in a court of law. The relief is, that Painter be decreed to reduce the principal of the mortgage according to his agreement by paying $3,000 on account of the principal.

Certainly, a court of law could not grant this relief. The plaintiff asks for a specific performance of this agreement, and I think the proceedings show, *prima facie*, that he has a right to it.

I do not see how the plaintiff could recover any thing beyond nominal damages, at law, without showing that his mortgage had been foreclosed for the whole principal, and that the mortgaged premises or interests did not bring sufficient to pay the mortgage.

It appears to me that the plaintiff's complaint was inadvertently dismissed, as it was, on his opening and the pleadings; and that the judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

INGRAHAM, J.—Even if the prayer in the complaint was merely for a sum of money, the facts averred therein show a good cause of action in equity, in which plaintiff was entitled to relief.

If so, and the court had jurisdiction, it could give such relief as the party was entitled to, including a judgment for money, if proper.

I concur in reversing the judgment.

BALDWIN *a.* TYNES.

Supreme Court, First District; Chambers, January, 1865.

ACKNOWLEDGMENT OF ASSIGNMENT FOR BENEFIT OF CREDITORS. —POWER OF PARTNER.

Under the statute of 1860—which requires assignments for benefit of creditors to be acknowledged—where an assignment is duly executed on the part of a firm by one of the partners, in their name, an acknowledgment made only, by the partner thus signing it, is sufficient.

One member of a firm may with the express consent and direction of the other members, execute a valid assignment of all the firm-property in trust for the benefit of creditors.*

Motion to dissolve an injunction.

This was a creditor's action brought by Harris M. Baldwin, Nathaniel Fisher, and Henry Dix, against Julian G. Tynes, Adolphus D. Smith; and Samuel S. J. Frith, to set aside an assignment for benefit of creditors made by Julian G. Tynes and Adolphus D. Smith, composing the firm of Tynes & Smith, to the defendant, the assignee, Samuel S. J. Frith.

The assignment in question described the assignor Tynes as the resident partner of the firm at the city of New York, and the assignor Smith as of the British Province of Prince Edward's Island. The assignee was a resident of Brooklyn, in this State.

It recited that the firm had become indebted and were insolvent; that the assignor Smith was absent from the city of New York, and that Tynes desired, and that Smith had consented and directed that all the property of the firm should be applied to the payment of their debts, &c., in the form and manner set forth in the assignment, and declared that "the parties of the first part, the said Tynes & Smith, by Julian G. Tynes, partner present as aforesaid, in the absence of said Adol-

* Compare Coope *a.* Bowles, 18 *Ante.*

phus D. Smith, in consideration of the premises," &c., assigned, &c., proceeding in the usual form to transfer their assets, and direct the application thereof.

This assignment was signed by Julian G. Tynes, in the absence of his partner, "Tynes & Smith, by Julian G. Tynes, partner present." The acknowledgment was in this form: "On," &c., "before me came Julian G. Tynes, to me personally known, and known to me to be one of the firm of Tynes & Smith described in, and who executed the above assignment of the said Julian G. Tynes, one of said firm; and he the said Julian G. Tynes acknowledged to me that he executed the said above assignment as the act and deed of said firm."

The plaintiffs having procured an injunction restraining the defendants from interfering with the property, the defendants now moved on affidavits to set aside the injunction.

This motion was founded on the summons and complaint and the assignment therein referred to, &c., and upon affidavits by the assignee and others, the material portions of which were to the effect that the assignee accepted the assignment at the request of both the partners, and upon their representations made to him; that the defendant Smith was the first who expressed to the assignee their intention to make an assignment to him; that Smith arranged the preliminaries of the assignment with the assignee, and left the particulars of information necessary in order to drawing it to be communicated by the defendant Tynes, and appointed a meeting with the assignee and Tynes for executing the assignment; that he left the city without so meeting them, and had telegraphed to Tynes to assign to Frith, and that he would send on the accounts immediately; that since the assignment, the assignee had received letters from Smith, dated at his residence in Prince Edwards Island, and concerning the business of the trusts created by the assignment.

T. D. Hall, for the motion.

Fithian, Clark & Smith, opposed.

Ingraham, J.—The principal objections to the validity of the

assignment, and for which I conclude the injunction was granted, were—

1st. That the assignment was not acknowledged by both partners.

2d. That it was made only by one of the firm.

The assignment purports to be executed by the firm in the name of the firm, and acknowledged by one of the partners as the deed of the firm. This I think was a sufficient acknowledgment by the party executing within the provisions of the statute.

The party who executed, acknowledged it. If the execution is good, the acknowledgment is good also.

2. The assignment was executed by one partner in the name of the firm, and with the express assent and direction of his partner.

This made the signature the act of the firm, and the execution of the assignment to be the act of both.

The cause of Wells *a.* Marsh, in Court of Appeals, June, 1864, decides this question.

There one of the partners ran away, leaving a letter to the other partner requesting him to close up the concern. Under this the partner dissolved the partnership, and executed an assignment for the benefit of the creditors.

This was held to be valid, the letter of the absent partner showing his assent to the assignment.

The assignment is valid, and the injunction should be dissolved.

MARETZEK *a.* CAULDWELL.

New York Superior Court; General Term, November, 1864.

PLEADING.—DEMURRER TO ANSWER.—DENIALS OF IMMATERIAL AVERMENTS.—MOTION TO MAKE DEFINITE.

In an answer, a defence which merely takes issue on allegations in the complaint, is not demurrable. If the allegations are immaterial, the remedy is by motion.

This rule applies to averments in a defence pleaded in an action for libel, that the charges contained in the alleged libellous publication were true. Such matter is not new matter, within the meaning of section 153 of the Code.

Mitigating circumstances set up in an answer in an action for libel are not a defence within the meaning of section 160 of the Code, which requires a pleading to be made definite and certain. Where the precise nature of the defence is not apparent, such allegations are to be regarded as a mere notice.

Appeal from an order overruling a demurrer to parts of an answer, and denying a motion to make other parts more definite and certain, and to strike out still other parts.

This action was brought by Max Maretzek, the manager of an opera in the city of New York, against the defendants, William Cauldwell and Horace P. Whitney, publishers, editors, and proprietors of *The Sunday Mercury*, a weekly paper published in the city, to recover damages for two articles printed therein in October, 1863. The first article was headed, "The Disgrace of the Opera," and it described the opera of the plaintiff as being frequented by vicious and immoral persons, and being such an exhibition as respectable women could not patronize. The second article, which was set forth as a second cause of action, was entitled, "The Academy of Music Under a Cloud—Sin in High Places," and this article made the same charges with more particularity; stated that to fill up the house dead-head tickets had been furnished to people whom no decent citizen "could wish to see sit beside his wife or daughter; and certain it is that the 'scarlet women' have blazed forth in all their glory and shame from parquet, dress-circle, and box; the

lobbies have become infested with representatives from the worst of the city gambling hells, and owners of pocket-books and watches are compelled to keep a bright look-out for their valuables. One of the most conspicuous patrons of the present opera, is a Tombs lawyer, known to the public as the husband of a notorious courtezan, lately deceased. This person nightly occupies a position in the dress-circle, in full view of the whole house, with female companions after his kind. But what particularly incensed the decent patrons of the opera, was the report that one of the female *artistes*, who was given a prominent place on the bills, was the mistress of a male member of the troupe—a woman whose private character was such, that it was an insult to every virtuous woman in the house to allow her on the stage. Whether this story was true or not, it had its effect upon the receipts of the treasury."

The inuendoes with which these articles were set forth in the complaint are not material to be stated.

The defendants put in an answer denying various allegations of the complaint, including all those which went to set forth the first cause of action, and denying that the defendants intended to injure the plaintiff or his business, and that he had been injured.

For a second defence, they averred that each and every of the allegations set up in the first cause of action was true; reaffirming the charge in the same general language in which it was made in the first article complained of.

For a third defence, they averred that each and every allegation in the second article complained of was true; reiterating it in the same language above stated.

For fourth and fifth defences, the defendants said that they did plead, and would insist upon, the matters stated in the second and third defences respectively as mitigating circumstances.

For sixth and seventh defences, they averred that they published the articles respectively in the course of their business as public journalists; and they had been, in their capacity of the editors referred to in the complaint, credibly, and from motives of public policy, informed thereof, and that they believed the same to be true; and that, in their said capacities as public journalists, they had been requested by the plaintiff to speak of

his opera for the best advantage of the public; and that they believed it was for the best advantage of the public, as well as of the plaintiff, to know and be advised of these aforesaid matters; and that they had, in doing as in this cause of defence mentioned, no malice towards the plaintiff, nor ill-will towards him, nor intent to injure him or his business; and that the said matters were and are fair and legitimate matters of public news and items of particular and general interest to the reading public, and were fair and candid comments on a place of public amusement, and were published for the purpose of disseminating among the persons, subscribers to their said newspaper, information which these defendants as aforesaid believed to be true, and such as, if true, ought to be so published for the information aforesaid, and they therefore plead and will insist upon the foregoing averments in mitigation of damages.

For an eighth defence, they stated in mitigation of damages that the plaintiff, in a book entitled "Crotchets and Quavers," published by him, had admitted that he was a charlatan, to the contrary of his allegations in respect to his business and character in the complaint.

For a ninth defence, they alleged, both by way of justifying and by way of mitigation, that the opera was attended by pickpockets and women of known bad character, whose names and residences were unknown to the defendants, who were in some instances brought there by and under cards of free admission, furnished by plaintiff's regular agents, and that some of the stockholders and subscribers of the Academy of Music complained to those defendants of said things, and that such foregoing matters were publicly canvassed by the general public.

The plaintiff moved to compel the defendants to make the fourth and fifth defences in mitigation more definite and certain, by setting forth the particulars of the matters alluded to; and the eighth defence, by stating in what part of the book such admissions were made; also to strike out as irrelevant and redundant the sixth, seventh, and ninth defences, and such part of the eighth as was pleaded in mitigation of damages, and if any be not stricken out, that the defendants name the persons indicated in the sixth and seventh defences as having informed them of these matters, and name the agents of the plaintiff who were charged with having given free admission to persons of bad character;

and also to name the stockholders who had complained to the defendants.

The plaintiff also demurred to the first, second, and third defences as not sufficient, specifying various grounds which are all substantially comprised in the objections that the issues were immaterial; that none of the denials constituted a defence; and that the matter was double, so that a correct issue could not be had.

The cause was heard upon the demurrer and motion together, before Chief Justice Robertson, in April, 1864, who overruled the demurrer, and granted the motion in part only. He rendered the following opinion.

Robertson, Ch. J.—The first statement in the answer as a defence is not demurrable, because it merely takes issue on allegations in the complaint. (*Code*, § 153, Smith *a.* Greening; S. C., 2 *Sandf.*, 702.) If they are immaterial, the only remedy for any prejudice arising therefrom to the plaintiff, if they stood alone, would be to move for judgment; and if they seriously encumbered the record, to strike them out under section 160 of the Code. Whether he would be successful in the latter motion may be doubted. (King *a.* Utica Ins. Co., 6 *How.*, 485.)

The only question under the demurrer to the second and third defences is, whether the charges in the defamatory publication complained of are so specific that an averment of their truth is sufficient as against a demurrer. Averments, in an answer, of specific facts are necessary, when the accusation is general, of stealing, dishonesty, and the like. (Anon., 3 *How. Pr.*, 406; Fry *a.* Bennett, 5 *Sandf.*, 54.) But the charge in the publications in question, of the unfitness of the plaintiff's exhibitions for the resort of respectable persons, is accompanied by specific charges of the admission of persons of specified immoral and illegal pursuits and occupations by the plaintiff's permission and encouragement, which is sufficient to make similar averments in a defence a good pleading as against a demurrer. (Van Wyck *a.* Guthrie, 4 *Duer*, 268; S. C., 17 *N. Y.*, 190, *sub nom.* Van Wyck *a.* Aspinwall.) If the plaintiff wishes further information, the Code (§ 160) furnishes ample remedy for any defect in the definiteness and certainty of the answer. The demurrer must therefore be overruled.

The motion also to strike out the sixth, seventh, and ninth defences as redundant or irrelevant, must be denied, as they allege new matter, and are not so verbose or repetitious in their statement as to subject them to that objection.

The motion to render more definite and certain the fourth, fifth, sixth, seventh, and eighth defences, raises the question how far mitigating circumstances set up in an answer in an action for libel, in connection with a defence of the truth of the publication, under the Code (§ 165), constitute a partial defence to the action, so as to require to be pleaded. If allegations of mitigating circumstances in an answer be a mere notice, it would not come within the 160th section of the Code, which only requires a pleading to be made definite and certain, where the precise nature of the defence is not apparent.

In the case of Newman *a.* Otto *et al.*, in this court, 4 *Sandf.*, 669, it was held by Judge Duer that such allegations operated as a mere notice, and were not a defence; because, if pleaded alone they might be struck out as frivolous.

In Graham *a.* Stone, 6 *How. Pr.*, 19, and Brown *a.* Orvis, *Ib.*, 376, both cases in the Court of Appeals, Justices Johnson and Harris held separately and respectively that no facts could be set up in an answer in mitigation of damages, except when accompanied by an averment of the truth of the charge. The doctrine so laid down seems to have been disapproved of by Justices Allen and Selden in a subsequent case in the Court of Appeals. (Bush *a.* Prosser, 11 *N. Y.*, 347.) The question of its soundness, however, did not fairly arise, nor was its repudiation involved in or necessary to the decision of that case. The sole question in it was, whether evidence offered on the trial, of bad conduct, on the part of the plaintiff, similar to that of which the defendant accused him, was admissible. There was no justification of the truth of the charge in the case, and although the defendant had set out in his answer the facts, of which he offered the evidence on the trial, it was not necessary to hold that they must be pleaded in order to warrant its admission. No objection could have arisen on that score; for whether those allegations were a mere notice or formed a pleading, the evidence was equally admissible under either theory. Justice Allen seems to have assumed as unquestionable that any thing given in evidence to reduce damages, either in an ac-

tion of tort or contract, was a defence within the meaning of the Code (§ 150), which allows as many defences to be set up as the defendant may have. He takes no notice of any distinction in that respect between torts and contracts, so admirably pointed out by Judge Duer in Newman *a.* Otto (*ubi sup.*), which is, that a partial defence in an action on a contract necessarily reduces the damages, debt, or sum claimed; while in one for tort the effect of mitigating circumstances is uncertain. The jury may give the same damages, whether the circumstances offered in reduction are proved to have occurred or not. The same cause of action remains, whether the damages arising from it are aggravated or mitigated. In the former case, no issue could be taken on the matter of aggravation (*Steph. on Plead.*, 243); the reason is equally good why it should not be on matters in diminution. Hence, while partial defences in an action on a contract must be pleaded (McKyring *a.* Ball, 16 *N. Y.*, 297; Houghton *a.* Townsend, 8 *How. Pr.*, 441; Gleason *a.* Moore, 2 *Duer*, 640; Barr *a.* Baker, 9 *Mo.*, 840), the whole current of authorities is against the right or duty to set up circumstances in mitigation, unless in an action for tort, except for a libel or slander where the charge is justified. (Rosenthal, 1 *Code* (N. S.), 228; Scheiden *a.* Schultz, 4 *Sandf.*, S. C., 664; Salters *a.* Kip, 5 *Duer*, 646; S. C., 12 *How. Pr.*, 343; 2 *Abbotts' Pr.*, 383; Gilbert *a.* Rounds, 14 *How. Pr.*, 46; Travis *a.* Barer, 24 *Barb.*, 614. If such circumstances constituted the whole answer, no judgment within the meaning of the Code could be given on an issue formed by a reply, because it could not be the final determination of the rights of the parties (§ 245) without an assessment of damages; and there is nothing in the Code to indicate that it was designed to deprive the defendant of the formerly existing right of reducing the damages on an assessment by evidence in mitigation. The very section (§ 165) which provides for the admission of such circumstances, notwithstanding the publication is justified, and there is a failure to establish such justification, accompanies the permission to a defendant to avail himself of that provision, by requiring the circumstances to be set out in the answer with the justification, but only in reduction of damages. If the framers of the Code had considered circumstances in mitigation to be a defence, and an answer to a cause of action within the meaning of the 150th

section, there would have been no necessity to require a defendant to set up such circumstances, but simply to have said that setting them up as a defence with a justification should not deprive the defendant of the right of proving them, because of the justification. But the 165th section contains two provisions—first, for alleging such circumstances in the answers along with a defence of truth; and secondly, of allowing evidence of them when so alleged, notwithstanding such defence. The injustice of the former rule, as to allowing matters in mitigation before a sheriff's jury, is not so apparent as to favor such an interpretation. I am compelled, therefore, to follow Judge Duer's opinion already alluded to, sustained as it is by its own reasons, and the opinion of Justices Johnson and Harris, already referred to (Graham *a.* Stone, and Brown *a.* Harris), in place of the views of Justices Allen and Selden in the case also before referred to (Bush *a.* Prosser), which, as they were not necessary to the decision of the case, I may be excused for looking upon as *obiter dicta.* The motion to make definite and certain the statements in the answer, of circumstances in reduction of damages, must therefore be denied. They could not be struck out as frivolous, because they accompany a justification of the publication complained of, which is permitted by the Code (§ 150).

I think the ninth defence sufficiently definite and certain as to the names of the sharpers of both sexes and persons of improper character who frequented the plaintiff's exhibitions with the permission of his agents, because the defendants state such names to be unknown; but not so as to the agents of the plaintiff alleged to have furnished free tickets of admission to such improper persons, because he is entitled to be prepared to prove their want or excess of authority. So also as to the subscribers and stockholders who have complained to the defendants, whose names it must be presumed they know, if they know them to be such subscribers or stockholders. In those respects the motion must be granted as to the names or other description of such agents and stockholders, but denied as to the rest.

No judgment can be given on the demurrers, as they merely raise an immaterial issue of law, but an order may be made overruling them for that reason, and the motion must be denied, except in the matter before stated. No costs can be allowed to either party on the demurrers and motion; and there being

no judgment, there is no need of giving leave to amend, but the plaintiff may withdraw his demurrer if he finds it necessary.

The plaintiff appealed to the court at general term from the chief parts of the order entered upon this decision, as is stated in the opinion of the court.

S. B. H. Judah, for the appellant.—I. The true construction of section 165 of the Code is that, although the truth may be given as a justification, yet if the truth itself is unjustifiable, that is, published maliciously and with an evil intent, and for no good purpose, it is no justification. (*Holt's Law of Libel*, 48.)

In setting up the truth as a justification, the defendant is bound—

1st. To show that the publication of such truth was for justifiable ends, and with good motives. (26 *Wend.*, 383.)

2d. The defence must be as broad as the charge.

3d. The facts on which he relies must be so specifically set up that they apprize the plaintiff of the defence. (*Holt's Law of Libel*, 280–282; Newman *a.* Bailed, cited 1 *T. R.*, 750; Lanson *a.* Street, *Chitty's Pl.*, 503–506, and cases cited; 1 *Ib.*, 487, in notes.)

The Code has not altered the substance or form necessary to be pleaded in a defence of the truth in justification.

The causes set out in the demurrer to the second separate defence are good causes of demurrer.

(*a.*) The matter set up is a mere repetition and averment of the truth of the libel as charged in the complaint. Where the defamatory charge is made in general terms, it is not sufficient to answer that the general charge is true; the justification must be made by a specification of the facts which are relied on to establish the truth.

The alleged facts are a mere averment of the general charge, and not so specific as to apprize the plaintiff of the defence. The plaintiff is not compelled to make an answer, bad in substance, good, by calling on the defendant to make it definite and certain. (5 *How. Pr.*, 470; 6 *Ib.*, 258; 3 *Ib.*, 406; cases cited in note to Code, § 165, Voorhies' ed.; Fry *a.* Bennett, 5

Sandf., 54; 6 *How. Pr.*, 84; Fabbricotti *a.* Launitz, 1 *Code R., N. S.*, 121; 25 *How. Pr.*, 419.)

(*b.*) But even if well pleaded, the matter relied on in the answer does not amount to a justification. Hunt *a.* Bennett, 19 *N. Y.*, 173; vide NELSON, J., in Hotchkiss *a.* Oliphant, 2 *Hill*, 513.)

(*c.*) The second separate defence is bad.

The positions in the second point apply in every respect to the third separate defence or answer, with the additional objections:

First. That in the third answer there is an attempt to make a double issue,—the one that the facts are true, and the other that the calumny originated from and was circulated by others than the defendants. The Code has not altered the cardinal principles of pleading: a double plea is bad for such duplicity.

The Code contemplates a single answer. (§ 150.) Each separate defence is to be separately pleaded. (4 *Kern.*, 469; 21 *N. Y.*, 399.)

Second. If the defendants seek to shift the origin of the libel on others, even the giving of names and particulars would not relieve them of responsibility: such disclosures would not be allowed in evidence to mitigate damages. (Dale *a.* Lyon, 10 *Johns.*, 447; Mapes *a.* Weeks, 4 *Wend.*, 659; Inman *a.* Foster, 8 *Ib.*, 602.)

But if the allegation that other persons disseminated the libel forms a defence of justification, the answer is bad in substance, in not setting out the names of the persons, time, place, and other particulars or specifications. (2 *Chitty's Pl.*, 507, note *f*; 7 *T. R.*, 17; 2 *East.*, 426.)

(*d.*) The answer or defence is not as broad as the charge, and therefore does not amount to a justification. Each separate defence or answer must contain all that is requisite to answer the whole cause of action. (*Code*, § 222, cases cited in note; 7 *Abbotts' Pr.*, 378; 2 *Bosw.*, 694; 2 *Ib.*, 391.) Resort, to make an answer full, cannot be had to another answer. (4 *Ib.*, 391; 10 *Abbotts' Pr.*, 266.)

IV. The matters of the sixth, seventh, and part of eighth defence, moved to be stricken out, are such as neither amount to a defence, nor could be given in evidence in mitigation of damages.

(*a.*) Mitigating circumstances are, those which the well-defined rules of law allow in evidence in mitigation of damages. (1 *Code R., N. S.*, 181.) If the point taken is correct, that newspaper editors or journalists have no privilege to libel or slander, the matter set up in the sixth and seventh answers are surely not mitigatory, nor is the part of the eighth answer complained of admissible in evidence (being foreign to the issue); and the rule is clear that when the matter does not amount to a mitigation, it should be stricken out as irrelevant and redundant. (3 *How. Pr.*, 406; 6 *Ib.*, 15; 10 *Ib.*, 158.)

(*b.*) The sixth and seventh answers are not accompanied by a justification, but only refer to denials of malice in the other answers; and do not amount even to mitigating defences, and make an immaterial issue; and being such, are irrelevant. (2 *Abbotts' Pr.*, 331; 4 *Sandf.*, 668; 1 *Code R., N. S.*, 102; 5 *How. Pr.*, 476.)

(*c.*) The charges or allegations in the answers are general, and do not amount to mitigating circumstances. (Russ *a.* Brooks, 4 *E. D. Smith*, 645.)

They do not apprize the plaintiff of the specific grounds of the defence: general report, common gossip, popular clamor, are not admissible in evidence as mitigating circumstances, and are irrelevant. (6 *How. Pr.*, 15; 13 *Ib.*, 97.)

An answer setting up mitigating circumstances, if irrelevant, will be stricken out on motion. (10 *How. Pr.*, 128.)

V. Matter set up in mitigation of damages, in a suit for slander or libel, is a defence within the meaning of the Code. It has been questioned whether it amounts to a defence, standing alone; but there is no doubt that, when accompanied by a justfication in the same answer, such a defence is not a notice, but a part of the defence or answer. If not pleaded, the matter cannot, by section 165, be even offered in evidence. (Opinions of Selden and Allen, JJ., in Bush *a.* Prosser, 11 *N. Y.*, 347.) However subtle the reasoning of Duer, J., in Otto *a.* Newman (4 *Sandf.*, 669), it cannot destroy the plain words of the statute. The distinction is obvious, that in libel and slander the Code specifies the kind of defence that may be set up, while it leaves matter in mitigation in other torts (assault and battery, &c.) to be given in evidence, to reduce the damages; in other words, in this one case, it directs the mitigating circumstances to be

pleaded. The very nature of the case is such, where the charge is general, that matter in mitigation should be specifically set out in the answer, to apprize the plaintiff what he is to meet. Even if, taking the name of an answer, it can be characterized as in the nature of a notice, it still should be specific; and if not, justice would direct it to be made definite and certain: the question of its effect should not be left to the time of trial, to be decided whether, under a notice general in its charges, specific matter could be given in evidence. The plaintiff has the right to demand, under section 160, that a general pleading should be made definite and certain, or it should be stricken out as irrelevant. If these positions be correct, then the fourth, sixth, seventh, and the part of the eighth answers are not definite and certain, and should be made so in the particulars required by the plaintiffs.

A. Oakey Hall, for respondents.

By the COURT.*—MCCUNN, J.—The appeal in this case is from an order made at special term by the Chief-Justice, overruling the demurrers of the plaintiff to the first, second, and third portions of the defendants' answers, and also denying the plaintiff's motion, which is of an extraordinary mixed nature, to compel defendants to make more certain and definite the fourth, fifth, sixth, seventh, and eighth defences of the answer, as well as to strike out as irrelevant and redundant the sixth and seventh and part of the eighth defences of said answer, and other parts of defendants' answers, specified in the plaintiff's notice of motion at special term.

In regard to the question of the demurrer, there can be no doubt that the Chief-Justice was clearly right in overruling it.

The portions of the answer demurred to certainly do not contain new matter that constitutes a counter-claim or defence, as provided for by the 153d section of the Code. These portions of the answer merely deny the allegations of the complaint, and are properly pleaded.

The case cited by the Chief-Justice (Smith *a.* Greening, 2

* Present—ROBERTSON, Ch. J., and MONELL and MCCUNN, JJ.

Sandf., 702) is fully sustained by the case of Neuman *a.* Otto, decided by Chief-Justice Duer (4 *Sandf.*, 668).

The motion to render more definite and certain the fourth, fifth, sixth, seventh, and eighth defences was properly denied. Such allegations operate as a mere notice, if they form part of the answer.

This doctrine was so held in the case of Graham *a.* Stone and Brown *a.* Orvis, both being cases decided in the Court of Appeals, and is so well settled that no doubt can now arise in regard to this principle in actions for libel and slander. So also in regard to the ninth defence of the answer.

It is certainly definite enough in this particular to fully apprize the plaintiff of the defence to be adopted on the trial, and to prepare him to meet the issue. It specifically alleges "that the cards of free admission were furnished by the plaintiff's regular agents, and that some of the stockholders and subscribers complained to the defendants of said things, and such foregoing matters were publicly canvassed by the general public." The Chief-Justice, however, seems to think that the defendants should be compelled to allege the names of these regular agents of the plaintiff, and also of the stockholders and subscribers who complained to defendants. But this he bases simply upon the presumption that the defendants knew their names, for the reason that they do not allege that their names are unknown. On the general principle maintained by the learned Chief-Justice, and sustained by the cases cited by him, I can see no reason for exception in this regard; and, although fully concurring with him in his very lucid and able opinion, I must differ with him in regard to granting the motion to compel the defendants to allege the names of the agents, and stockholders, and subscribers, referred to in that portion of their answer; but this portion of the order not having been appealed from by the plaintiff, the entire order at special term must be affirmed with costs.

Robertson, Ch. J., and Monell, J., concurred.

MECHANICS' BANK OF WILLIAMSBURGH *a.* FOSTER.

Supreme Court, First District; General Term, Feb., 1865.

DEFENCES.—USURY.—NOTE MADE BY ONE PARTNER FOR HIS OWN USES.—BURDEN OF PROOF.

Under an answer merely averring that the note sued on was void for want of consideration, and that the plaintiffs are not *bona fide* holders, the defence of usury, though it appear by the evidence on the trial, is not available to the defendant.

The fact that the seller of a note offered it for a less sum than at the legal rate of discount is not sufficient to impose upon the buyer, when he sues thereon, the burden of proving inquiry as to the validity of the note.

Where a note is made by one partner in the firm name for his own use, the firm are liable upon it to a party subsequently discounting it, where usury is not established, unless knowledge that the proceeds were not to be used for the benefit of the firm is brought home to him.

The action was brought to recover the amount of a promissory note purchased by the plaintiffs at a discount of 11 per cent. per annum.

The note was signed with the firm name of the defendants, S. H. and C. W. Foster, was drawn by S. H. Foster, one of the firm, for his own use, was not entered on the books of the company, and had nothing to do with the business of the firm. S. H. Foster, after he made the note, sold it to one Furman at 11 per cent. discount, who sold it to the plaintiffs at the same rate.

The answer denied that the plaintiffs were *bona fide* holders of the note, and averred that the note was without consideration and void.

The judge before whom the cause was tried ordered a verdict for the plaintiffs, subject to the opinion of the court on a case to be made.

D. Lord, for plaintiffs.

E. Pierrepont, for defendants.

BY THE COURT.—INGRAHAM, P. J.—It is very clear, if the de-

fendants had set up the defence of usury in the answer, they would have succeeded in their defence.

The note was made for the accommodation of one of the defendants, and was sold by him at a usurious rate of interest. It was therefore clearly void for usury, not only in the hands of Furman, but of any other subsequent holder. But as the defendant has not pleaded this matter as a defence, it is equally clear that he cannot now defeat the plaintiff's recovery for this cause.

The defence now relied on is that the note, so far as it purports to be made by the firm, is an accommodation note, or rather a note without consideration, and that the plaintiffs are not *bona fide* holders without notice, and therefore cannot recover.

It can hardly be said that the note in any sense is an accommodation note. If it was issued for the purpose of raising money for S. H. Foster, then, although the other member of the firm might not be liable, still he would be if the note was bought by Furman; and would be, as to that defendant, free from any defence except that of usury. And as to Charles W. Foster, he would not be liable on it, unless it was passed to a *bona fide* holder who paid value for it, without notice of the facts under which it was made, or under circumstances which warranted the belief that it was used for the purpose of raising money for the firm.

It is not necessary for us to decide whether Furman was or was not a *bona fide* holder. If he knew, when he took the note, of the circumstances under which it was put in circulation, he might be considered as the immediate usurious purchaser, and he would not come into possession of the note in the fair course of trade. His purchase, with knowledge of such facts, might not be *bona fide.* (Ramsdell *a.* Morgan, 16 *Wend.*, 575; Keutzen *a.* Parks, 2 *Sandf.*, 60.)

The usury, if there was any, was in the first purchase by Furman from Nelson, and that usury would taint the note in the hands of all subsequent holders, even if they paid the full value without any knowledge of the previous transaction.

The title to the note by that sale passed to Furman, but any recovery upon it was subject to be defeated by the defence of usury.

But the plaintiffs are not in the same condition, and do not stand in the same relation to the defendants. They had no knowledge that the note was sold for the benefit of the defendants, or either of them, and they cannot be charged with any usurious intent. The sale of a note by a stranger to the plaintiff at a sum less than it would have been if only legal interest was deducted, was not necessarily usurious. The note had previously been put in circulation. The presumption was that it was issued for value. If the original sale to Furman had been free from usury, the subsequent sale to the plaintiff, although at a less sum, would not be a usurious transaction. After the note has thus passed into circulation, usury cannot be predicated upon the dealings in regard to it by subsequent holders. It is only necessary, to defeat the charge of usury, to show, in the first sale, the payment of the whole sum except the legal discount.

Transactions in regard to the same paper between the party to whom it was first sold and a subsequent purchaser, cannot be the subject of usury, to excuse the makers from payment.

The plaintiffs had a right to take the note, and as between them and Furman they were not limited to a legal rate of discount. The mere fact that the owner of the note was willing to sell it for a less sum, was not sufficient to throw on the plaintiffs the responsibility of inquiry as to the character of the note. This is the only ground on which the *bona fides* of their purchase can be assailed, and if it did not require them to make inquiry as to the character of the note before they purchased it, it becomes immaterial. (Steinhart *a.* Bokee, 34 *Barb.*, 436; Holmes *a.* Williams, 10 *Paige*, 326.)

I am, however, disposed to go further in the decision of this case. The borrowing of money by one partner on the note of the firm is within the ordinary powers of a partner, and within the ordinary course of business. Freed from the charge of usury, the defendants would be liable, unless knowledge that the proceeds were not to be used for the benefit of the firm was brought home to the party discounting it. The note, therefore, in Furman's hand might, for all that was known to the plaintiff, be a valid note; and the presumption was that it was so, in the absence of any proof to the contrary. (Warren *a.* French, 6 *Allen*, 317.) The sale of the note under such circumstances

to the plaintiff by Furman was not a circumstance to put them on inquiry, or to deprive them of the character of *bona fide* holders for value. (Conn. River Bank *a.* French *et al.*, 6 *Allen*, 313.)

The judgment should be affirmed.

CLERKE, J., concurred.

MATTER OF TILTON.

Supreme Court, First District; At Chambers, January, 1865.

ATTACHMENT AGAINST SHIPS AND VESSELS.—SHERIFF.

In proceedings by the attachment of vessels under the act of 1862, the filing of a specification of the debt previous to applying for the writ, is necessary only where the vessel has left port.

The omission to specify the names of the owners of the vessel in the application is not a fatal defect.

Clerical defects in the application may be amended upon its presentation.

If the undertaking offered do not conform to the statute, it may be amended under the power given by 2 Rev. Stat., 556; and when amended will be valid from the time of its execution.

A sheriff cannot execute a writ or warrant of attachment out of his own county. Where he did so under a mistake as to the boundary of his county, the property attached was ordered to be released.

Motion to discharge an attachment.

The plaintiff, Leonard Tilton, having procured an attachment against the "Elevator Corn Exchange," lying in the East River, under chapter 482 of the Laws of 1862, the defendants moved to set aside the attachment for various alleged irregularities in the proceedings; among others, that it did not appear that any specification of the debt had been filed in the office of the clerk of the city and county of New York, as required by section 3 of the statute; that the application did not contain the names of the owners of the vessel; and that the

time when the debt was contracted, required by the 5th section of the act, was not stated, the year having been omitted in the list of items. (This defect was, however, supplied by the judge on issuing the attachment.)

The affidavits on the motion did not show that the vessel had ever left the port of New York.

Objection was also taken to the attachment on the ground of informality in the undertaking.

Two attachments were issued, the one to the sheriff of the county of Kings, who supposing the portion of the East River where the vessel lay to be in that county, had seized the vessel there. The other was issued to the sheriff of the county of New York.

W. J. Haskett, for the motion.

Egan & Gross, opposed.

CLERKE, J.—The application, upon which the warrant in this matter was granted, contains substantially all that the act of 1862 requires.

It contains the amount and items composing the debt; it states by whom and when it was contracted, and in the verification states that the amount is justly due over and above all payments and deductions or discounts.

It states, indeed, that the debt was contracted by the owners of the vessel without specifying their names. It is, certainly, better to specify the names, if they are known to the applicant; but I do not think the omission a fatal defect. The specification of items accompanying the application, when first presented, omitted the year. This was a mere clerical inadvertence, which could in no respect have misled any one; and it was afterwards amended by the judge who granted the warrant.

The counsel for the owners of the vessel contends, that a specification of items should have been filed prior to the application; but it is evident, on referring to section 2 in connection with section 5, that the prior filing of a specification is only required whenever the vessel has left the port at which the debt was contracted. The act in no other case requires such filing;

and, therefore, in the application it would be entirely out of place to refer to it, unless the vessel had left the port.

It would be just as improper to file a specification prior to the application, and to state such filing in the application when the vessel had not left the port, as to refer to an assignment or transfer of the debt when such had not taken place since the debt was contracted. As to the fact of the departure, I think there is no sufficient evidence of it even now before me.

The undertaking presented at the time of the application was, in one particular, defective.

It does not make the obligors liable if the applicant should not prosecute within three months any bond which may be given upon the discharge of the warrant, as provided for by section 12 of the act; but the power of amendment in such cases is very fully and specifically given by statute. (2 *Rev. Stat.*, 556; same stat., 3 *Rev. Stat.*, 5 ed., §§ 35, 36.)

The obligors, as the latter section provides, have made application to amend the bond, and have submitted one for approval. The bond, when properly amended, shall, in the words of the statute, "be deemed valid from the time of the execution thereof."

Two warrants have been issued in this matter,—one to the sheriff of Kings county, the other to the sheriff of the county of New York, in order to have the vessel seized in whichever county she may be, there being some doubt of her precise position in this respect. It appears now that she has been the whole time within the limits of the county of New York, but the sheriff of Kings county has seized her under the belief that she was within his baliwick. The authority of a sheriff is confined to his own county. It has been held, indeed, that he may perform certain ministerial acts out of his county, as to make a panel or return a writ, but he cannot execute a writ or warrant out of it. The mistake of the sheriff of Kings in this matter was made in consequence of the impression that, as the vessel lay near to the shore of Kings county, she was within its legal limits. Of course such a mistake would make him liable only for nominal damages at most; but if she is within the limits of the county of New York, as seems to be conceded, she can only be seized by the sheriff of that county, and the sheriff of Kings cannot retain her under any pretext.

The order is, that the vessel shall be released from the custody of the sheriff of Kings county; but the motion, as far as it demands that the warrant issued to the sheriff of the county of New York, and the proceedings under it should be set aside, is denied without costs.

In the amended bond reference is made to the 11th instead of the 12th section. This must be corrected. Indeed, if the necessary number of months is mentioned, there is no need of a reference to any particular section.

The amended bond, when corrected, must be again submitted to me.

ST. JOHN *a.* VOORHIES.

Supreme Court, First District; General Term, March, 1865.

SURROGATE'S LEAVE TO ISSUE EXECUTION.—WAIVER OF PROCESS.

Under the provisions of 2 Rev. Stat., 116,—which authorize the surrogate, upon application of a judgment creditor of an executor or administrator, to require an accounting and allow execution to be issued,—it is erroneous to proceed by an order to show cause without the issue of a citation.

But the defect of omitting such citation is waived by the executor or administrator appearing and proceeding without objection.*

If on the accounting there appear to be no assets in the hands of the executor or administrator, the surrogate cannot grant leave to issue execution. An order granting leave cannot be sustained on the ground that the executor or administrator had paid other claims of inferior right, or had neglected to reduce to possession certain assets to which he ought to have resorted. (INGRAHAM, P. J., dissented.)

It is erroneous for the surrogate to grant leave to issue execution, unless the administrator apply for a sale of the real estate, especially if it does not appear that the time to make such application has elapsed. (Per CLERKE, J.)

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* See also Clapp *a.* Graves (26 *N. Y.*, 418), where it is held that a long summons, issued by a justice's court against a non-resident, is not a nullity, though the statute (ch. 300 of 1831, § 33) declares that, in such case, the justice shall have no jurisdiction. The defendant waives the irregularity and gives jurisdiction as to his person, if he appears and pleads to the complaint without objection to the process.

Appeal from an order of the surrogate granting the respondent leave to issue execution.

The respondent, Mary Ann Voorhies, had obtained a judgment against the appellant, Milton St. John, as administrator, upon a demand against the estate which he represented. The administrator had contested the claim, and appealed from the judgment against him to the Court of Appeals, where it was affirmed.

The plaintiff in the judgment, the present respondent, then applied to the surrogate for leave to issue execution under 2 Rev. Stat., 116. An order to show cause was granted against the administrator, on the return of which he appeared and rendered an account. No citation was issued to compel him to do so, but he took no objection on this account at the time.

It did not appear that the administrator actually had assets in his hands, but it did appear that he had paid claims over which the judgment now sought to be enforced had by law a preference, and that there were assets which he had neglected to reduce to possession.

The surrogate granted an order that unless the administrator should pay the judgment within thirty days, or apply for the sale of the real estate of the decedent for the payment of his debts, the execution asked for might issue.

From this order the administrator now appealed.

INGRAHAM, P. J.—A petition was presented to the surrogate for leave to issue an execution upon a judgment recovered against an administrator. This judgment had been finally affirmed in the Court of Appeals. Such petition was in accordance with the 20th section of the statute. (2 *Rev. Stat.*, 116; same stat., 5 ed., vol. 3, p. 204.)

On this application the surrogate made an order for the administrator to show cause why an execution should not issue on the judgment.

This was erroneous, as the 21st section requires him to issue a citation requiring the administrator to appear and account. If the objection had been taken before the surrogate, he no doubt would have corrected the order or issued the citation. But the administrator did account before the surrogate on the

return of the order. He could waive the defect in the order, or he could have appeared before the surrogate and consented to account, and submit to the surrogate the questions on the order. His accounting must be considered on his part as waiving the citation. The surrogate in his decree recites that the administrator was cited to account, and that he had produced and filed his account, and had assets properly applicable to the payment of this claim.

On the accounting, it is apparent that the administrator has paid out the assets of the estate to particular claims in full, without reserving the portions necessary to the payment of this claim, and that he has neglected to reduce to possession assets which he should have applied to the payment of the debts. There were, then, assets applicable to the payment of this claim, as the administrator was not entitled to be allowed payments made wrongfully by him.

On such a finding, it became the duty of the surrogate to make a decree or order, that an execution be issued for the amount so applicable (§ 21); and such order, when made by him, is conclusive evidence that there are sufficient assets in the hands of the administrator to pay the amount for which the execution is issued. (§ 22.)

The order of the surrogate was not absolute, but conditional. It was ordered, unless the administrator, within 30 days, pay the balance due upon the judgment or apply for the sale of the real estate, that execution should issue.

It also ordered the administrator to pay the amount of the judgment adjudged to be due to the petitioner.

This order was not in all respects authorized by the statute on this application. All that the statute provides for is an order that an execution be allowed to issue for the amount applicable to pay the execution.

The direction to pay the whole amount forthwith may be considered as an adjudication that there were assets sufficient to pay the amount due on the judgment, especially as the order provides, in case he does not pay as directed, that the execution issue. No other order is contemplated in regard to that branch of the order. The administrator surely should not complain that execution is delayed thirty days to enable him to pay the money or apply for a sale of the real estate. Either event

would have stayed the execution. The respondent might have complained of such privilege being granted, as it stayed the execution to which the surrogate had adjudged her to be entitled. So far as the administrator was affected by it, it was a favor and not a wrong.

The appellant objects that it does not appear that the time within which he should apply for a sale of the real estate had not expired. That was immaterial. The surrogate did not require him to obtain the order of sale, but to make the application. If he had done so, he would have fulfilled the condition on which the order became a nullity.

A very slight examination of the account shows the administrator has paid out large sums to other creditors, to the prejudice of the petitioner, and it may well be that the surrogate concluded that the administrator had assets for which he was responsible to an amount more than sufficient to pay the petitioner, besides other assets under his control which he had not converted into money.

We are referred to the case of Mitchell *a.* Mount* (17 *Abbotts' Pr.*, 265) as an authority against this order. In that case it appeared that the assets were only $17,000, and the debts $42,000, and the order of the surrogate directed the payment of the whole debt. This was clearly erroneous.

In the present case, it appears that the administrator has received a larger sum than he has paid out, and he does not show any outstanding debts against the estate. It also appears that a portion of the property belonging to the estate is still unsold. The distinction between the cases shows the above-cited case is not controlling.

This claim appears to have been contested by the administrator to the Court of Appeals. The decision of that court should be final, and should terminate litigation, and yet, while all other creditors are paid off, the administrator still seeks to litigate this claim.

I do not think, under these circumstances, that we are called upon, on mere technical grounds, to reverse the whole of this order. As I have before said, the statute required the surrogate to make an order that execution be issued for the amount ap-

* See reversal of that decision, *Ante*, 1.

plicable to its payment. He has decided that the administrator was liable to pay the whole, and I think correctly so, and the order can be so modified as to conform to the statute without the necessity of sending it back by a reversal.

In fact, the whole order is not appealed from.

So much of the order as directs the payment of the money forthwith should be reversed, and the condition annexed to the issuing of the execution also stricken out, and the order so modified as to direct that an execution issue upon the judgment for the collection of the balance due thereon.

No costs should be allowed to either party on this appeal.

SUTHERLAND, J.—I agree that the appellant, by appealing and accounting, must be considered as having waived any irregularity from the want of the citation to account, or from the fact that the surrogate made an order to show cause only instead of a citation; but I am inclined to think that the parts of the order appealed from should be reversed, for the reason that the order was made on the ground that the appellant ought to have had sufficient assets in his hands to pay the debt; not that he had.

CLERKE, J.—The proceedings prescribed by the statute, no doubt, must be strictly pursued. This statute requires when a creditor has obtained a judgment against an executor or administrator, and applies for an order against him, to show cause why an execution should not be issued thereon, that the surrogate shall issue a citation requiring the executor or administrator to appear and account before him; and if upon such accounting it shall appear that there are assets in the hands of such executor or administrator, properly applicable, in whole or in part, to the judgment so obtained, the surrogate shall make an order that execution be issued for the amount so applicable. (2 *Rev. Stat.*, 116, §§ 19, 20; same stat., 5 ed., vol. 3, p. 204, §§ 20, 21.)

In this case it appears that no citation was issued requiring the administrator to account. The executor, however, proceeded to account on the return of the order to show cause, thus waiving any objection on this ground.

But on this accounting it is expressly shown that there were then no assets in his hands.

The surrogate, therefore, had no authority to make the order.

The statute does not empower him to order an execution, because assets had been in his hands at a previous period: it employs the present, not the past tense.

The order, also, directs execution for the balance of the whole claim, although it does not positively appear that the total assets, if all realized, would be sufficient to pay all debts in full. As we remarked in Mitchell *a.* Mount (17 *Abbotts' Pr.*, 267), the most that he could do would be to order an execution for the sum that may have appeared on the settlement of the account to be a just proportion of the assets applicable to the judgment.

I also agree with the counsel of the appellant, that the order is erroneous in directing execution, unless the administrator apply for a sale of the real estate. The statute gives the surrogate power to order execution simply, and it does not appear that the three years within which application can be made (for authority to sell the real estate) have not elapsed. (2 *Rev. Stat.*, 100, § 1; same stat., 5 ed., 186, vol. 3, § 1.)

If, as is alleged, the administrator has paid other creditors in full, he has done so at his peril; but that does not dispense with the necessity of a strict observance of what the statute prescribes in these proceedings.

The order of the surrogate should be reversed, with costs of the appeal.

Order reversed.

DONOVAN *a.* THE MAYOR, &c., OF NEW YORK.

Supreme Court, First District; General Term, December, 1864.

PLEADING.—DEFENCES IN ACTION ON MUNICIPAL CONTRACT.

In an action against the corporation of the city of New York, to recover for work and labor, an answer setting up that there was an appropriation made by law for such work which has been exhausted, is insufficient, unless it appears

clearly from the pleadings and the law referred to, that the work was covered by the appropriation, and not by others contained in the same law.

If it does not appear by the pleadings whether the contract was made by any of the city departments or not, an averment that no appropriation had been made as required by section 28 of the charter of 1857, is insufficient.

It is no defence to an action against a municipal corporation for services actually rendered, upon an employment by one of its agents, ordinarily and apparently having power to employ such services, that an appropriation required by law to be made in advance, had not in fact been made; or that having been made, it had been otherwise expended.

Appeal from a judgment on a demurrer to an answer.

This action was brought by John Donovan against the Mayor, Aldermen, and Commonalty of the city of New York, to recover for work, labor, and materials. The contents of the pleadings are stated in the opinion of the court.

At special term, judgment was ordered for the plaintiff on his demurrer to the answer of the defendants, and the defendants appealed.

By the Court.—Barnard, J.—The plaintiff has brought an action against the defendants, averring in the ordinary language that in November and December, 1863, he did work and furnished materials to the defendants, and at their request, upon the public roads of the city.

To this complaint the defendants interpose a special defence, as follows:

"*Second.* The defendants for a second, separate, and distinct defence aver, that in and by an act of the Legislature of the State of New York, passed April 24, 1863, which act is published in the Laws of 1863, 407, ch. 227, and to which the defendants hereby refer, there was appropriated the sum of seventy-five thousand dollars to defray the expense of repairing roads and avenues for the year 1863.

"The defendants further answering, aver that at the time the indebtedness mentioned and referred to in the complaint is alleged to have accrued, and at the time of the alleged employment of the plaintiff to perform the work and furnish the materials mentioned in the complaint, the said appropriation was exhausted, and there was and is no money in the city treasury applicable to the payment of the plaintiff's claim.

"The defendants aver that no appropriation covering the expense of the work alleged to have been done has ever been made; and they aver that the necessity for the work has never been certified to by the street commissioner, nor was the work ever authorized by the Common Council."

To this defence the plaintiff has interposed a demurrer, and upon it he had judgment in his favor at special term, and from this judgment the defendants appeal to this court.

A short examination will, I think, show that the demurrer is well taken.

The complainant does not aver what kind of work he did, nor what materials he furnished to the defendants.

It is no answer to his claim for work and materials done and furnished upon the public roads of the city, that there was an appropriation made by State authority of $75,000 for roads and avenues, which was expended. If the plaintiff's claim was for Belgian pavement, or for cleaning streets, or for repaving or repairing streets, the act set forth in the answer appropriates several hundred thousand dollars to these purposes. It is not averred, and it does not appear, that plaintiff's work was such as was covered by the $75,000 appropriation, and not such as was covered by several other appropriations in and by the act set forth.

The complaint does not aver who employed the plaintiff on behalf of defendants.

It is no defence to his claim for his work to aver that no appropriation had been made to cover the expense of the plaintiff's alleged work, according to section 28 of the charter of 1857, because by that section the departments of the city government are thereby forbidden to incur expense before an appropriation.

It does not appear, and is not averred, that any department employed the plaintiff.

The Common Council may have done it by resolution.

The remaining portion of the defence demurred to arises under section 38, of ch. 446, Laws of 1857, which provides for the issue of all contracts over $250 in amount, by sealed bids, received after notice, and that all contracts under that amount should be upon the certificate of the "appropriate department," and that the "expenditure be as authorized by the Common Council."

It does not appear, and is not averred, that the plaintiff's contract was under or over $250, or that the street commissioner was the proper department to certify to its necessity; neither is it averred that the "expenditure" was not as authorized by the Common Council.

There is nothing in the pleading which brings the plaintiff necessarily under these provisions of the charter.

If the answer clearly presented the defence, that the plaintiff was employed by an agent of defendant, ordinarily and apparently having power to do so, and work was done under this employment, it would not bar his recovery that an appropriation required to be made in advance had not in fact been made; or that if it had been made, that it was expended. The city, and not the laborer, would be required to suffer for the improper use of power of the agent of the defendants.

It cannot be that the plaintiff, if legally employed, ceased to be so by the expenditure of the appropriation for the particular work on which he was engaged, without notice from the defendants.

The other judges concurred.

Judgment affirmed, with costs.

BENSON *a.* SUAREZ.

Supreme Court, Third District; General Term, May, 1864.

NEW TRIAL.—LANDLORD AND TENANT.—DAMAGE BY FALL OF UNSAFE BUILDING.—CHARGE.

The owner of land with an unsafe building upon it may be held liable for injuries done by the falling of the building to the property of an occupant of adjoining land, notwithstanding the former had leased the premises to another person, reserving rent but covenanting to repair.

It seems, that he would be liable without any covenant to repair.*

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* See Davenport *a.* Ruckman, 16 *Abbotts' Pr.*, 341; Anderson *a.* Dickie, 11 *Bosw.*

It makes no difference that the covenant to repair was qualified as being for the purposes of a hotel.

Under a lease providing that the tenant shall not sublet without *written* consent of the lessor, a person who is in actual occupation as a sub-tenant of the lessee with *oral* consent of the lessor, is not a wrong-doer; and he may recover against the lessor for damages done to his property by the fall of such unsafe building upon the premises.

Motion for a new trial, on a bill of exceptions.

The action was brought by Nathan L. Benson against Leonardo S. Suarez, to recover damages which were stated in the complaint substantially as follows:

That on the 1st May, 1860, the plaintiff was, and ever since had been, in the lawful possession and occupation of a lot of land in Cohoes, on which was situated a building occupied by plaintiff as a carriage-house. That the defendant was, and still is, the owner of another lot of land next adjoining. And that before the accruing of the cause of action herein stated, the defendant, by his servants and agents, negligently and insecurely erected upon the lot of land so owned by defendant, a building used and occupied by the tenant of defendant as a shed for innkeeping purposes, and carelessly and negligently allowed the same, from decay and other causes, to be and remain in a weak, insecure, and unsafe condition—of all which the said defendant had notice—until on or about the first day of February, 1861, when the said shed, in consequence of such defects and causes, fell to the ground, thereby dragging down, the same being attached thereto, the carriage-house building so occupied by the plaintiff, thereby injuring certain carriages and sleighs, property of plaintiff, in the carriage-house building.

The answer was a general denial.

The cause was tried at the Albany Circuit on the 20th of November, 1863, before Mr. Justice Hogeboom and a jury.

The plaintiff proved a lease made by the defendant, by his agent, W. M. Chadwick, to one O. O. Finney, for the premises in question, including as well the ground on which the carriage-house stood, of which the plaintiff was in occupation at the time of the injury, as the premises upon which the decayed shed was, which was connected with buildings occupied by Finney, under the lease, as a hotel. The lease contained the

usual covenants on the part of the tenant that he would quit and surrender the premises at the expiration of said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted; and that he would not assign, let or underlet, the whole or any part of the premises, without the written consent of the landlord. It also contained a covenant on the part of the lessor that he would repair in case of partial damage by fire; and also that he would immediately proceed to do certain repairs and painting, "and to make such other repairs as may be needed to place the entire premises in a thorough tenantable condition as a hotel."

The plaintiff testified that he had been in occupation before this lease under previous owners, and that after defendant became owner of the premises the plaintiff occupied under Finney. That the plaintiff's agent, Chadwick, knew that he was occupying that part of the premises, and that he had done so for years. And that Chadwick had made repairs on the part of the buildings occupied by the plaintiff.

Finney, the tenant, testified that the plaintiff was in occupation of such part of the premises when the defendant hired, and that Chadwick understood that he was to remain. That in answer to his objecting that the rent was too high, Chadwick said that the rent from Benson, the plaintiff, would in effect reduce the amount.

When the plaintiff rested, the defendant moved for a nonsuit, which was refused. He then gave evidence which he relied on as showing that the building was in good condition to withstand all ordinary danger of the elements, and that the accident was caused by a very heavy fall of snow.

The judge, among other things, charged the jury as follows.

That if the plaintiff was in the occupation of the premises with the knowledge, consent, and approval of the defendant, it was the duty of the defendant to keep the buildings on the adjoining premises in such condition and repair as to withstand the ordinary action of the elements; and that if they found that the defendant's building on the premises adjoining those occupied by the plaintiff fell by means of the defendant's neglect to keep it in such condition and repair, and thereby the plaintiff's property was injured or destroyed, the plaintiff was entitled to recover.

That if they found that the plaintiff was thus lawfully there in occupation of these premises, he would be entitled to recover the damages that he might have suffered by means of the adjoining building being so negligently attended to that it fell, and thus caused the destruction of the plaintiff's property.

That the plaintiff was lawfully there, if he was there with the knowledge, consent, and approval of the defendant, and that it was for them to determine whether he was so there from the evidence in the case.

That the plaintiff was lawfully there, if he was there occupying the premises with the knowledge and consent of the defendant; and that he was so there could be inferred from the inducements held out before the lease was made, from the knowledge defendant had of his being there, and from his making repairs whilst plaintiff was in the occupancy.

That as to the rights of the plaintiff, if he was in the lawful occupation of the building, as before mentioned, which was connected with and framed into those of the defendant, the defendant was bound to keep his premises in such repair as to withstand the ordinary action of the elements; and that if they found the other propositions in favor of the plaintiff, and that this building fell by means of its not being in such a state of repair, then the plaintiff was entitled to recover.

To these several instructions plaintiff's counsel duly excepted.

The judge was asked to charge the jury, that if the plaintiff went into the occupancy of these buildings with the full knowledge of their condition, and thus voluntarily exposed himself to the hazard, it did not create any liability on the part of the defendant to repair as to him, or keep the building in a condition to resist the ordinary action of the elements, and the plaintiff would not then be entitled to recover; which he refused to charge, provided the jury found that the plaintiff went into and continued in possession lawfully, and with the knowledge, consent, and approval of defendant, as before explained; and the defendant's counsel excepted to such refusal.

The jury rendered a verdict in favor of the plaintiff for $500, and the court ordered that the proceedings upon the verdict be stayed until the determination of the general term, and that the exceptions be heard in the first instance at the general term.

Henry Smith, for the motion.

Ira Shafer, opposed.

By the Court.*—Peckham, J.—The defendant insists that the judge erred in refusing to nonsuit the plaintiff. I do not think so. The defendant was the owner of the tavern-stand and appurtenances where the old shed fell. He had leased them to Finney, and covenanted to keep them in repair. He failed to keep this old shed on his premises in repair, and by reason of its being left in a weak and dilapidated condition it fell down, and drew down a shed adjoining to it of the plaintiff, and injured his wagons, &c., to the amount of the verdict.

I am not at all clear that it was necessary to show any covenant to repair by the defendant in order to sustain this action. "*Sic utere tuo ut alienum non lædas*" is a sound maxim, and entirely applicable to this case. An owner has no right to erect a nuisance on his own land to the injury of his neighbors. He cannot erect so weak and unsafe a building that it shall fall in ordinary times from its mere insecurity and insufficient strength, and thus injure the building or property on his adjoining neighbor, without being responsible for that injury. Nor can he suffer a building on his premises to become so much out of repair as to cause a like injury without being responsible, especially when he had notice of its condition and neglected to repair.

Nor can he shield himself from liability in such a case by charging negligence on his neighbor, for presuming to occupy his own lot in a careful manner in the face of such a danger.

What is this but saying to his neighbor, "I have erected an unsafe and dangerous building on my lot, and you must allow yours to lie vacant and unoccupied, otherwise my building may blow down upon you and destroy your property." See Cook *a.* The Champlain Transportation Co. (1 *Denio*, 91); and see Lasala *a.* Holbrook (4 *Paige*, 169), Panton *a.* Holland (17 *J. R.*, 92.)

Leasing premises to another, reserving rent, with such an unsafe building thereon, I do not think discharges the liability of the owner. Whether it does or not, however, is not material

* Present—Peckham, Miller, and Ingalls, JJ.

here, as the defendant in this case agreed to keep the building in repair.

It is objected that it was only for hotel purposes that he agreed to keep it in repair. That contract fully covers this case. They were not in sufficient repair for hotel purposes when they could not stand in ordinary weather.

I see no error in the charge of the judge. The plaintiff could no doubt be in the lawful possession of the premises leased to Finney, without any consent in writing from the defendant, the owner.

He was in the actual occupation thereof. He had the consent of Finney, the lessee of the defendant, to be in. He had the actual consent of the defendant to be in also, but he had no written consent.

As to whom, then, was he a wrong-doer?

It is of not the slightest consequence that the lease provided that the lessee should not underlet without the consent in writing of the lessor.

This was not an action upon the lease, and this plaintiff was no party to the lease. Surely, by the consent of all the parties interested, he could get into the lawful possession and occupation of the premises.

He had all that, as the jury have found, and as the evidence proved.

Nor do I think the judge committed any error in refusing to charge as requested; and I think the remarks already made, if correct, show that he could not be required so to charge.

A new trial is denied, and judgment ordered upon the verdict.

ROACH *a.* LA FARGE.

Supreme Court, First District; General Term, November, 1864

REVIVAL BY SUPPLEMENTAL COMPLAINT.

The filing of a supplemental complaint for the purpose of reviving an action after the expiration of a year from the death of a party, is a matter of right.

A motion for leave to file such a supplemental complaint is unnecessary, and should be denied, leaving the applicant to file it as he may be advised.

Appeal from an order denying a motion for leave to file supplemental complaint.

In this action, which was brought by Peter Roach against John La Farge, the plaintiff moved at special term, more than a year after the death of the defendant, which occurred pending the action, for leave to file a supplemental complaint to revive the action against his personal representatives. The motion being denied, he took the present appeal.

BY THE COURT.*—BARNARD, J.—This was a motion made at special term by the plaintiff for leave to file a supplemental complaint for the purpose of reviving the action.

The motion was denied at special term, and an appeal taken from the order entered on such denial.

In the Matter of Borsdorf (17 *Abbotts' Pr.*, 168), the general term of this district decided that the filing of a supplemental complaint for this purpose was a matter of right, and that a motion for leave to file such complaint for such purpose was both unnecessary and improper. I think the decision in the Borsdorf case correct, and see no reason for departing from it; the filing of a supplemental complaint by plaintiff for the purpose of reviving an action being a matter of right.

* Present, LEONARD, P. J., SUTHERLAND and BARNARD, JJ.

Order affirmed, on the ground that the motion was unnecessary and improper.

SUTHERLAND, J.—I concur in affirming the order, without costs.

LEONARD, P. J.—The Code (§ 121) has introduced a form known to the practice of the late Court of Chancery, and applied it for the purpose of reviving an action, after the party entitled to revive has omitted for a year to proceed in a more simple manner for that purpose by motion.

The office of a supplemental bill in chancery was, generally, to introduce new facts which had arisen since the bringing of the original bill; and leave to file the supplemental bill must be obtained from the court. "If there is probable cause for filing it, leave will be given of course, and the court only examines the question so far as to see that the privilege is not abused for the purpose of delay and vexation to the defendant; and in a case of doubt, the court will direct notice of the application to be given." (1 *Hoffman's Ch. Pr.*, 403.)

The same author says the practice is most safe to apply for leave in all cases.

If the application to revive be made within a year, the formality of a supplemental complaint is unnecessary; but the leave of the court must be obtained by a motion.

It is true, the Code does not direct an application to the court for leave to bring the supplemental complaint after the expiration of a year from the time of the death or other disability of a party; but such was the former practice in respect to supplemental bills, and I do not see how or when it was abrogated.

Had the Code directed the action to be continued by a bill of revivor, then the former practice in relation to such bills would have been impliedly adopted, and I concede that the practice of bringing it, without application for leave, would have been regular.

The proceedings by bill of revivor, and supplemental bill, were each well known to the practice in the Court of Chancery; and when the "supplemental complaint" was introduced into the Code, it seems appropriate that the practice prevailing at

the introduction of the Code in relation to that proceeding should be adopted.

I am unable to perceive any good reason why the leave to bring the supplemental complaint should not be granted.

The motion was denied at special term only for the purpose of enabling the question to be brought before the general term by appeal.

Since the decision in the Matter of Borsdorf (17 *Abbotts' Pr.*, 168; S. C., 41 *Barb.*, 211), we must, until some other practice is adopted by more united authority, adhere to the rule there prescribed.

The plaintiff, in the present case, will serve his supplemental complaint for the purpose of continuing his action, if so advised, although the leave to do so is denied.

I think the order should be affirmed without costs.

Order affirmed, without costs, on the ground that the motion was unnecessary and improper.

WILLIAMS *a.* BARNAMAN.

Supreme Court, Eighth District; General Term, May, 1865.

ATTACHMENT IN JUSTICE'S COURT.—DEFECTIVE RETURN.—JURISDICTION.—ATTACHMENT BOND.

A statement in an affidavit that the defendant is justly indebted to the plaintiff on a demand arising upon keeping his horses,—*Held*, to be a sufficient statement that the demand is one "arising upon contract, express or implied," within the meaning of the statute (2 *Rev. Stat.*, 273; 8 ed., 462, § 216), to sustain an attachment. It is sufficient that the affidavit tends to establish such a demand.

Under the Non-imprisonment Act, a bond by the plaintiff with one surety is sufficient to warrant the issuing of an attachment.

Where the body of the attachment-bond wholly omitted the name of the surety, but the bond was plainly subscribed by him for the purpose of becoming surety, and the justice approved of him as "the security in the bond,"—*Held*, a sufficient signing by the surety to render the bond valid.

Where the constable fails to state in his written return the date of the service of the attachment, and to date his return, these data may be supplied from other facts in the proceedings.

Where a constable fails to state in his written return that he left a copy of the inventory and attachment with the person *in whose possession* the property attached was at the time of the service of the attachment, the omission is fatal to any judgment upon such attachment, whether it is questioned on appeal or collaterally, and no other evidence of that fact can be admitted to sustain such judgment.

A statement that a copy of the inventory and attachment were "left with B.'s wife, as B. cannot be found in this county," is a sufficient statement that B. was not personally served.

Appeal from an order at special term, denying a new trial.*

This action was brought to recover the value of a team of horses alleged to have been converted by defendant to his own use. The answer alleged that prior to the commencement of this action, the defendant, by process of attachment issued at his instance by a justice of the peace of Niagara county, against the plaintiff in this action and others, as non-residents of said county, had caused the plaintiff's team to be attached; and pursuant to an execution issued upon the judgment rendered in that proceeding by the justice of the peace, the team was sold, and purchased by the defendant on such sale; and averred that such seizure and sale were a bar to this action.

On the trial there was a conflict of evidence upon the point whether a demand was made by the plaintiff for the return of the team prior to the commencement of the attachment proceeding, and the jury found against the plaintiff. The principal questions grew out of the regularity of the proceedings before the justice in the attachment-suit.

The defendant called Solomon S. McMerrick, the constable who served the attachment, and examined him as a witness, who testified that he "was a constable in 1862; he had this attachment; attached a pair of horses at Martinsville; they were in Barnaman's barn; he was not at home; one of his sons and his wife were there; he left a copy of attachment and inventory with her the same day the attachment was issued, and returned it to the justice: that he served summons the 5th of June;

* A previous decision is reported in 18 *Ante*, 158.

could not find either of defendants in the county, and he returned it to the justice. The execution shown me was issued and delivered to me. Advertised horses for sale under it, and sold them."

The evidence relative to the service of the attachment and the return thereof to the justice, given by this witness, was duly objected to by plaintiff's counsel, on the grounds that it must appear by the return of the officer on the attachment that the requirements of the statute were complied with; and that parol evidence is inadmissible to prove the facts necessary to confer jurisdiction on the justice if the written return does not confer jurisdiction.

Which objection was overruled by the court, and plaintiff's counsel duly excepted.

The defendant then read in evidence the affidavit upon which the justice issued the attachment, as follows:

NIAGARA COUNTY.—ss.

Martin Barnaman, being duly sworn, deposes and saith, that James Williams and Samuel Peters are justly indebted to this deponent, on a demand arising upon keeping their horses, in the sum of thirty dollars, as near as this deponent can estimate the same, over and above all discounts the said James Williams and Samuel Peters has against him; that the said James Williams and Samuel Peters are non-residents of said county, and that no warrant can issue in this case.

MARTIN BARNAMAN.

Subscribed and sworn to before me,
this 2d day of June, 1862,
PETER GREINER, Justice of the Peace.

To the reading and reception of which in evidence plaintiff's counsel objected:—That the affidavit did not fulfil the requirements of the statute, and was insufficient to authorize the justice to issue an attachment; for the reasons, 1st, That it does not show that the affiants' demand arose upon contract; 2d, That it does not state that the demand is not for the recovery of money collected by a public officer, or, &c., as required by section 30 of chapter 300, Laws of 1831.

Which objections were overruled by the court, and plaintiff's counsel duly excepted.

The bond given by defendant on the issuance of the attachment was objected to on the grounds, 1st, That it was void, there being no surety in it; and 2d, that if the name of C. S. Hawley, signed at the bottom, is to be regarded as a surety, then it is equally void, as the statute requires *sureties* instead of surety.

There was no name in the body of the bond except that of the defendant in this action, whose name was signed to it. There was the name of C. S. Hawley also signed to it, but it was questioned whether he signed it as a surety or witness.

The defendant then read in evidence the attachment issued by the justice, with the constable's return of service thereon, which return was as follows:

"By virtue of the within attachment, I have seized and taken the following property—one span of bay horses or ponies; and made and left a copy of the said attachment with Barnaman's wife at Martinsville, as the defendants cannot be found in this county.

S. S. McMerrick, Const."

To the reading of which in evidence plaintiff's counsel objected:

1st, That the constable's return was insufficient in this: that it does not show that a copy of the attachment and inventory of the property attached were left with the person in whose possession the property attached was at the time of the service of the attachment.

2d, That the return does not show when the attachment was served.

3d, That the return does not state that the attachment was not personally served on the defendants.

Which objections were severally overruled by the court, and plaintiff's counsel duly excepted.

The defendant proved the recovery of a judgment in said action, and the sale of the team by virtue of an execution issued thereon; and the jury rendered a verdict for the defendant.

The plaintiff moved at special term for a new trial on a case with exceptions, which motion was denied. The following opinion was delivered by the justice who denied the motion, at Erie special term, November, 1864.

The motion was argued by

Geo. W. Cothran, for plaintiff.

L. L. Lewis, for defendant.

DANIELS, J.—The plaintiff moves for a new trial in this cause upon the ground that the verdict of the jury is against evidence, and also that certain rulings of the court as to the admission and effect of evidence given by the defendant were erroneous.

The action was brought to recover for the wrongful conversion of property seized and sold under attachment proceedings instituted in favor of the defendant against the plaintiff and another, before a justice of the peace in Niagara county, on the ground that the defendants in those proceedings were not residents of that county. Upon the trial, the principal question of fact litigated was whether a demand of the property was made by the plaintiff before the attachment-suit was commenced. On that the evidence conflicted. But the preponderance in favor of the plaintiff is not so great as to justify an interference with the verdict for that reason. That was a question of fact for the consideration of the jury; and their finding cannot be disturbed, although the court might deem the conclusion they came to not as fully warranted as a different finding would have been.

The defendants relied upon the proceedings in the attachment-suit as a defence to this action; and for that purpose they were proved and read in evidence.

In the affidavit presented to the justice, and upon which the attachment was issued, the defendant swears "that James Williams and Samuel Peters are justly indebted to him on a demand arising upon keeping their horses." This is urged as being so far defective as to prevent the justice from acquiring jurisdiction.

In order to warrant the issuing of an attachment, the statute requires that the demand sued for shall be one "arising upon contract, express or implied," &c. (3 *Rev. Stat.*, 462, §§ 212–218.) While it is not specifically stated that the demand mentioned arose upon contract, there is sufficient contained in the affidavit from which that can fairly be inferred. It is stated that the defendants are "justly indebted" for "keeping their

horses." In effect, this describes a demand arising upon contract; for that is the legal import of the term "indebted." (3 *Blackstone's Com.*, 154. Matter of Denny, 2 *Hill*, 220.) It is sufficient that the affidavit tends to establish such a demand. (Miller *a.* Brinkerhoff, 4 *Denio*, 120.)

The plaintiff also claims that the bond given on the issuing of the attachment is defective for two reasons—first, that it is without a surety; and secondly, that the statute requires two sureties. The body of the bond wholly omits the name of any surety. But the name of C. S. Hawley was plainly subscribed for the purpose of becoming surety, and not for the object of witnessing the execution of it by the plaintiff in the action. The justice so regarded it, and approved of him as "the security in the bond."

The attachment was issued under the Non-imprisonment Act, which requires that a bond shall be given "with such sureties, and upon such condition, as is required in section twenty-nine" of the article of the Revised Statutes therein referred to. (3 *Rev. Stat.*, 5 ed., 463, § 217.) The section thus referred to provides that the "applicant shall execute to the defendant a bond with sufficient surety, to be approved by" the justice. (*Ib.*, 431, § 27.) The section of the Non-imprisonment Act does not require "sureties" in the bond, but such sureties as are required to justify on attachment under the previous provisions of the Revised Statutes, which do not require sureties, but "sufficient surety." This language is satisfied by one surety with the applicant, who in this case executed the bond.

The remaining objections to the proceedings arise upon the return of the constable to the attachment. He does not state when he served the attachment, and has not dated his return. But the docket of the justice shows that the attachment was returned the same day it was issued. And he also swears that such was the fact. This disposes of that objection, for the attachment as a matter of fact must necessarily have been served a sufficient time before the return-day to constitute a compliance with the terms of the statute, as it was returned served to the justice the same day it was issued. But if that had not appeared as a matter of fact, it is at least doubtful whether the objection could now be maintained against the validity of the

proceedings. (Hoose *a.* Sherrill, 16 *Wend.*, 34; Bromley *a.* Smith, 2 *Hill*, 517.)

The constable, in his return to the attachment, states that he "left a copy of the attachment with Barnaman's wife at Martinsville, as the defendants cannot be found in this county." He does not certify that he found the property in her possession, or that he delivered to her an inventory of the property attached. In these respects the return is defective, but whether fatally so when the objection is made against the use of the proceedings in another action, is not entirely clear.

The Non-imprisonment Act requires the return, "in addition to what is now required," to "state specifically whether such copy [of the attachment] was or was not personally served." (3 *Rev. Stat.*, 5 ed., 463, § 218.) This does sufficiently appear from the return made, although it is not so declared in words. It is shown argumentatively. For as the defendants could not be found in the county, personal service of the attachment could not be made upon them. (VanKirk *a.* Wilds, 11 *Barb.*, 524–5; Rosenfield *a.* Howard, 15 *Barb.*, 546.)

As it was not personally served, and the defendants were not residents of the county of Niagara, it was the officer's duty to leave a copy of the attachment, and of the inventory of the property seized under it, "with the person in whose possession" he found the property. (3 *Rev. Stat.*, 5 ed., 431, § 29.) He is also required to make "a return of all his proceedings in writing, subscribed by him, with a copy of the inventory of the goods attached, certified by him." (*Ib.*, 432, § 33.)

This makes it his duty to state in his return, where such is the fact, that he did leave a copy of the inventory and a copy of the attachment with the person in whose possession he found the property. But the statement of these matters in the return of the officer does not seem to be required as the foundation of any subsequent proceedings on the part of the justice, or on the part of the plaintiff in the action. For the summons, which is the next step in the action, is to be issued when it appears "by the return that property was attached, and that a copy of such inventory and attachment was not personally served." (3 *Rev. Stat.*, 5 ed., 463, § 220.) If the defendant does not appear, and those matters are shown by the return, it is the duty of the justice to issue the summons; and if that is returned, "that the

defendant cannot be found after diligent inquiry," "then the justice shall proceed to hear and determine the cause." (*Ib.*)

It will be seen, therefore, from this examination of the statute, that while the officer is required to return all his proceedings, the subsequent action of the justice is made to depend entirely upon two circumstances which must be shown in the return. Those are the attachment of property and the failure to make personal service of the process upon the defendant. The object of the statute in requiring the officer to return the other proceedings taken by him under the attachment, must therefore be to supply evidence, under his hand and official oath, that in all the other particulars its terms have been complied with. For as the return, in other respects than those mentioned, does not constitute the foundation of further proceedings in the action, it merely supplies evidence that the directions of the statute as to the service of the process have been all observed. If the statute required that the justice should have evidence before him, in the constable's return, that a copy of the attachment and inventory had been left with the person in whose possession the property was found, before he could proceed further with the action, then it would become a matter of jurisdiction, rendering his proceedings without such evidence a nullity. But as it does not, such evidence is only important to show that the service made was in all respects regular. Where the return of the officer is defective in these respects, the judgment would undoubtedly be reversed upon appeal; for by the express terms of the statute the appeal must be heard upon the return of the justice. There is no way of supplying the defects by proof. But where the effect of the proceedings is drawn collaterally into consideration, the question of jurisdiction becomes to some extent one of fact, which in many instances must in some measure be determined by evidence. It is not to be supposed that such evidence can be supplied where the law requires a written affidavit of certain facts, or a return in writing of certain matters, as the foundation of the proceeding to be taken; but only where the matters which it is the duty of the officer to return are of a collateral nature, constituting evidence of the regularity of the service as distinguished from that which is indispensable to the exercise of jurisdiction. Even in those matters, if the officer certifies them in his return, that is gen-

erally conclusive between the parties. It "becomes evidence which the law will not allow to be contradicted. But where that evidence is not furnished by the return, there does not appear to be any well-founded objection to proving it as a fact, where it becomes proper to do so, for the purpose of sustaining the validity of the proceedings." Such seems to have been the opinion of BRONSON, J., in the case of Barnes *a.* Harris (4 *Comst.*, 385), and of ALLEN, J., in Reno *a.* Pindar (20 *N. Y.*, 304).

If the justice's proceedings can be maintained without it, then the evidence can do no harm. For it is an error that could not by possibility work an injury to the plaintiff.

The return of the officer on the summons fully complied with the statute. And the additional evidence given by him as a witness, showing its correctness as a matter of fact, though not proper, could do no possible harm to the plaintiff.

The evidence given by the constable showed a proper service of the inventory and copy-attachment upon Barnaman's wife. For that purpose she must be deemed to have the possession of the property kept in her husband's stable, when he is absent from home, as he was in this case. He was an innkeeper, and she is to be presumed to have charge of his affairs and control of his household during his absence: particularly as no other person was shown to be about the premises actually invested with such charge and control, besides her. (See cases cited in note 69, part 2, *Cow. & Hill's Notes*, 75.)

The motion for a new trial must be denied.

The plaintiff appealed to the general term from the order entered pursuant to the foregoing opinion, and from the judgment entered on the verdict, which appeals were heard at Erie general term, February, 1865.

Geo. W. Cothran, for the plaintiff.—I. The constable's return on the attachment is insufficient to confer jurisdiction. 1. It does not show that a certified copy of the attachment was left with the person in whose possession the property was found. 2. It does not show that a certified copy of the inventory of the attached property was left with the party in possession of

the property. 3. It does not show who was in possession of the property.

The justice's jurisdiction is, by the statute, made to depend upon the fact that these things appear by the officer's return. (See opinion of the court in same case on former motion for new trial, 18 *Abbotts' Pr.*, 158.) The meaning of the statute is, that if at the return-day it shall appear by the return that the attachment has been executed as required by sections 36 and 33 of the Non-imprisonment Act (3 *Rev. Stat.*, 5 ed., 462, §§ 215–463, 218) the summons may be taken out. To constitute a valid execution of an attachment under this act, the constable is required—1. If the defendant have a place of residence in the county, he shall leave a certified copy of the property attached at such residence; or, if the defendant have no place of residence in the county, such copies shall be left with the person in whose possession the property is found; but, 2. If the defendant can be found in the county, such copies shall be served on him personally, instead of leaving the same at his residence; 3. And he shall return all his proceedings in writing, subscribed by him (3 *Rev. Stat.*, 432, § 33); and in addition thereto shall state specifically whether such copies were or were not personally served.

Therefore, when the statute declares that "if it shall appear by the return," &c., "that a copy of such inventory and attachment was not personally served," it means, if it shall appear by the return that property has been attached, and that a certified copy of the attachment and inventory were left either, first, at the defendant's place of residence in the county, or, second, with the person in whose possession the property was found, &c., the plaintiff may take out a summons.

Reduced to practice, the result of the decision at special term would be: A justice issues an attachment; the constable, without notifying anybody, would seize property and return that he had seized it, and that he had not personally served the attachment and inventory; a summons would thereupon issue, judgment be rendered, and the defendant be deprived of his property, not only without due process of law, but without the opportunity of a trial, unless by accident he should learn of the proceedings and appear. Such a law as this no Legislature would have the constitutional power to enact; and

yet this is the practical effect of this statute, if the construction at special term is correct.

a. This proceeding (before the justice) is an action. And it is not only the intention of this act, but the whole policy of the law requires, that when an action is instituted, the original process shall be personally served on the defendant; or such other mode of service as the particular statute designates as a substitute for personal service shall be made, before the court acquires jurisdiction for any purpose.

Section 38 no more requires the officer to return a copy of his inventory than it does that he state the manner of service of the attachment; and yet it will not be contended but that the return of a copy of the inventory is not only required, but is indispensable to the justice's jurisdiction over the attached property. (3 *Rev. Stat.*, 432, § 33.)

b. It is provided in section 36 that "the return of said officer, in addition to what is now provided, shall state specifically whether such copy was or was not personally served upon the defendant."

The above provision is wholly ignored in this return. The statute does not merely require the specific fact, whether the attachment was or was not personally served, to appear by the return, but it requires that the fact whether it was or was not personally served shall appear specifically. Nothing less than a positive, unequivocal statement will be a compliance with this requirement.

c. It is just as much a jurisdictional question that the copy inventory and attachment shall be left at the defendant's place of residence, or with the person in possession of the property, as it is that a summons shall issue. And that both of these means are resorted to to apprize the defendant that his property has been seized, is the mode the law has pointed out of bringing the defendant, in so far as his property is concerned, within the jurisdiction and control of the court.

The seizure of the property alone brings it within the custody of the officer, subject to the order of the court, but the seizure alone does not authorize the court to proceed to sell it. And before the court can proceed to give judgment, the defendant is not only to be *summoned* to appear, but he must be served with the attachment and inventory in one of the modes pro-

vided. That when personally served, that fact should specifically appear by the return, is important; for in case of personal service, to issue a summons would result in the justice losing jurisdiction, and render his judgment void. (Marshall *a.* Canty, 14 *Abbotts' Pr.*, 237.)

II. 1. It is solely upon and by virtue of the constable's return of service of the attachment that the justice acquires jurisdiction. In so far as the mere question of jurisdiction is concerned, it is wholly immaterial whether, in fact, the attachment was served at all, so long as the officer's return shows on its face a proper service. The justice is not at liberty to inquire into its truthfulness or falsity, but is bound by it, and by it alone. He can avail himself of no other source of information, save the voluntary appearance, or waiver, of the defendant. When the return shows a proper service, he is bound to act; and when it does not show a legal service, if he acts, his acts are unauthorized. Proof of service of original process is for the sole purpose of conferring jurisdiction. It is the *proof* of service, and not the *service*, that authorizes the justice to act. If the written return of the officer making it did not show a legal service, the justice could not act. Nor would it be competent for him to put the officer on the witness-stand and allow him to testify to the service. To comply with the statute, there must be a *return* of the service made by the officer and subscribed by him, or his name may be subscribed by another at his request. (Reno *a.* Pindar, 20 *N. Y.*, 304.)

2. The court says that when a judgment is collaterally attacked, the question of jurisdiction is to some extent a question of fact. It was rather a question of law, arising upon the proofs upon which the justice acted in rendering it. If, as a matter of law, the justice had no jurisdiction, his judgment is void; and whether he had or had not jurisdiction is to be determined *solely* upon the evidence upon which the justice acted. If it be not competent for the justice, at the trial or on the return of the attachment, to put the officer on the stand and allow him to testify to the service, it most assuredly could not be competent to call him for that purpose years after the rendition of the judgment in another action. Had the officer been prosecuted for making a false return, he would not be permitted to vary or contradict the return as made.

3. In permitting the constable to come upon the stand on the trial of this action and testify to a proper service, the court erred, for the reasons: 1st. Jurisdiction was conferred on the justice, if at all, by the officer's *return* on the attachment, and not by the *fact of service.* 2d. The return or proof of service upon which the justice was alone authorized to act, must be in writing. 3d. The evidence only tends to establish, by oral testimony, the *fact* that a proper service was made. 4th. It does not show that that fact was brought to the knowledge of the justice at the time of issuing the summons, in a manner that was susceptible of judicial cognizance. 5th. It does not show the justice had any knowledge of any different service than such as appears by the written return. 6th. The question of jurisdiction is exclusively a question of law, and not of fact. 7th. The constable is estopped from showing any different service from that shown in his return, after the plaintiff having treated his written return as insufficient, and brought this action predicated upon that insufficiency. It would be a fraud upon the plaintiff, who, having his election to appeal or sue for the value of his property, has elected to sue. 8th. It is contrary alike to public policy and to the spirit of the statute to prevent frauds and perjuries, for it is permitting to be proved by parol what the statute requires to be in writing.

4. The ruling of the justice in receiving this testimony was erroneous, tested by the statute (3 *Rev. Stat.*, 432, § 33); was erroneous upon general principles, and is unsupported by authority. (Brown *a.* Cady, 19 *Wend.*, 477; Barnes *a.* Harris, 4 *Com.*, 374; Reno *a.* Pindar, 20 *N. Y.*, 304.)

L. L. Lewis, for defendant, relied upon the opinions at special term, given above.

By the Court.—Grover, P. J.—The motion for a new trial, upon the ground that the verdict was against evidence, was properly denied. The only material question of fact litigated upon the trial was, whether the plaintiff demanded the horses of the defendant before they were seized by the constable upon the attachment. Upon this the evidence was conflicting, and there was no such preponderance against the verdict as to justify setting it aside upon that ground.

Numerous exceptions were taken to the ruling of the judge in regard to the validity of the attachment, the proceedings preliminary to its issue, and the intermediate proceedings to the judgment rendered by the justice. I shall only examine the exception relating to the return made by the constable, of the service of the attachment, as I think it clear that all the others were correctly decided by the judge at special term, for the reasons assigned in the opinion there given,—except the one in question, and that relating to the proof given upon the trial, in aid of the return, of what the constable in fact did in serving the attachment. The return is as follows: "By virtue of the within attachment, I have seized and taken the following property—one span of bay horses or ponies; and made and left a copy of the said attachment with Barnaman's wife at Martinsville, as the defendant cannot be found in this county."

The attachment was issued under the provisions of the Non-imprisonment Act. The 36th section of that act provides that every attachment issued pursuant to its provisions shall be served in the manner provided for the service of attachments issued pursuant to the provisions of the Revised Statutes; except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served upon him personally, instead of leaving the same at the place provided by such statute. This return showed sufficiently clearly that the attachment had not been personally served, as it could be legally served in the county only, and the return states that the defendant could not be found therein.

The Revised Statutes (2 *Rev. Stat.*, 231, § 31) provide that the copy of attachment and inventory duly certified must be left at the defendant's last place of residence; or, if he had no place of residence in the county, with the person in whose possession the goods are found.

In this case the defendant not being found in the county, and having no place of residence therein, the law requires that the copy of attachment and inventory should be left with the person in whose possession the goods were found. This the return failed to show. By no intendment can it be understood that Mrs. Barnaman had any possession or control of the property attached, or had any thing to do with it.

The opinion of the learned justice at special term concedes

that the return is defective in this particular, but the judge arrives at the conclusion that these matters need not be stated as the foundation of further proceedings by the justice. This conclusion is based upon the clause of the statute which provides that when it shall appear by the return that the property has been attached, and that a copy of the inventory and attachment were not personally served, and the defendant fails to appear, the justice shall issue a summons, &c. That all the above requisites did appear from the return in this case; and, therefore, it was held that the justice's proceedings were valid, and constituted a defence to this action.

I am unable to bring my mind to assent to this conclusion. I think the true meaning of its "appearing from the return that property had been attached," is, that the attachment had been served in the manner required by law. In other words, that, in a legal sense, property is not attached until all the acts have been done by the officer required by law to constitute a service of the attachment. Should a constable simply seize property by virtue of an attachment, and do nothing further by way of completing the service, or attempt to complete it, I think he could not justify detaining the property seized.

This construction secures and effectuates the evident design of the Legislature in requiring the service of the inventory and copy of attachment, while the rule adopted at the special term defeats it. That design was to bring notice of the proceedings to the defendant, to enable him to defend against them.

It follows, that the return made by the officer did not justify further proceedings by the justice.

To obviate the difficulty, proof was given by the defendant showing that, in point of fact, the person with whom the inventory and copy of attachment were left had in fact the possession of the property at the time of service. I think the plaintiff's exception to this proof was well taken.

The statute requires the officer to return his proceedings in writing. The authority of the justice depends alone upon this return. He is not authorized to receive any other proofs of the facts. When the proceedings are called in question in any other court, they must be determined by the facts appearing before the justice. No one will question but that this is so

upon an appeal from the judgment. If not so when called in question collaterally in another court, it would present the anomaly of sustaining the judgment upon facts into which the justice had no right to inquire, and upon evidence that he was not authorized to receive. Such a rule would lead to much difficulty in determining whether justices' judgments were valid or not. The true rule prevents all difficulty by determining the question by the proceedings before the justice.

The judgment and order appealed from should be reversed, and a new trial ordered, costs to abide event.

MARVIN, J., concurred.

DANIELS, J., dissented.

BOWMAN *a.* TALLMAN.

New York Superior Court; General Term, November, 1864.

MOTION AGAINST IRREGULARITY.—LACHES.—ENTRY OF JUDGMENT ON APPEAL.—STAY OF PROCEEDINGS.

A stay of proceedings for the purposes of an appeal is not removed, so as to enable the respondent to issue execution upon the judgment appealed from, by a decision of the appeal announced orally and entered in the minutes. To supersede the stay there must be a formal judgment entered by the clerk.

But the issue of an execution after such decision entered on the minutes, and before the entry of a judgment, is a mere irregularity.

A motion to vacate it must be made promptly. Where after the levy of the execution upon defendant's property the judgment was entered, and defendant appealed from it to the Court of Appeals,—*Held*, that a motion made several months subsequently was too late.

Appeal from an order setting aside an execution and levy thereof.

The plaintiff, George Bowman, recovered judgment against the defendant, William M. Tallman, in February, 1864.

The defendant appealed to the general term, and gave the necessary undertaking to secure a stay of proceedings upon the judgment.

The appeal was argued at the general term, and on the 28th of May, 1864, the court orally announced its decision, affirming the judgment. The entry in the minutes made by the clerk was as follows, after the names of the judges holding the court and the title of the cause: "Judgment affirmed with costs."

On the 30th of May, 1864, the plaintiff issued an execution on the judgment thus affirmed. An order affirming the judgment was duly entered on the 31st of May, 1864. On the 8th of June, 1864, the defendant appealed to the Court of Appeals.

On the 5th of October, 1864, the defendant gave the plaintiff notice of a motion that the execution be vacated and set aside as irregular, illegal, and void, on the ground that at the time of its issuing the judgment had not been affirmed.

The motion was granted at special term, and the plaintiff appealed.

Elbridge T. Gerry, for the appellant.

George Bowman, respondent, in person.

MONELL, J.—I am inclined to think that, when the execution issued, the stay upon the judgment was not removed. The effect of giving the undertaking on the appeal to the general term was to stay all further proceedings upon the judgment appealed from (*Code*, § 339); and an execution could not regularly issue until after the decision of the general term affirming the judgment. The mere oral announcement of a decision by the judges sitting in the general term, and the mere entry of such decision in the minutes of the clerk, is not such a judgment of the general term as will authorize action under it. I think a formal judgment which embraces the decision, and which becomes a permanent record of the court, must be entered by the clerk, and that such judgment, only, removes the stay of proceedings. (Lentilhon *a.* Mayor, &c., 3 *Sandf.*, 721; S. C., 1 *Code, R., N. S.*, 111.)

There was, however, a valid judgment to support the execution. Its effect and operation, and the rights of the plaintiff to enforce it by appropriate process, was merely suspended pending the appeal; and it was an irregularity, in the conduct of the proceedings to enforce it, to issue an execution until after judgment of affirmance had been duly entered. But it was an irregularity merely. Mr. Tidd (1 *Tidd's Pr.*, 512) says: "An irregularity in practice may be defined to be the want of adherence to some prescribed rule or mode of proceeding. And it consists in omitting to do something that is necessary for the due and orderly conducting of a suit, ordering it in an unseasonable time or improper manner;" and he mentions the entering of judgment before the time to plead has expired, the service of an execution after its return-day, &c., &c., as instances of irregularities.

The long and uniform practice of the court has required that motions to vacate process or proceedings irregularly issued or taken in a cause, shall be made at the first opportunity after the irregularity has been discovered, otherwise the irregularity will be deemed to be waived.

The execution in this cause was issued on the 30th of May, 1864, and, as the defendant's attorney states in his affidavit, was on the same day levied on the defendant's property. Yet the defendant omitted to take any steps to procure the execution to be set aside until the 5th of October, more than four months after it was issued. I think he was too late, and should be deemed to have waived the irregularity, especially as the judgment of affirmance was entered in due form on the 2d of June, and the defendant appealed therefrom on the 8th of June, with knowledge of the irregular issuing of the execution.

The order appealed from should be reversed.

Robertson, Ch. J.—The Code terms every direction of a court or judge not included in a judgment "an order" (§ 400), but it would be a matter of little practical consequence whether the determination of a court at general term upon an appeal from a judgment at special term should be designated as an order or a judgment, were it not that the same section (just cited) requires an order to be entered in writing. Only "the final determination of the rights of the parties in an action"

can be a judgment which is required to be entered in the "judgment-book" kept by the clerk (§ 279), and to specify clearly the relief granted, or other determination of the action. (§ 280.) A copy of it is to form part of the "judgment-roll," along with the pleadings, verdict, report, exceptions, case, and certain other papers affecting it.

In case of a judgment at general term upon a verdict at special term, where directed to be subject to the opinion of the former, and in that case only, it being as reviewable on appeal as if exceptions had been actually taken on the trial (§ 333), questions or conclusions of law, together with a concise statement of the facts upon which they arise, are required to be filed with such judgment-roll. (*Ib.*) The general term is expressly authorized to render a technical "judgment" only in such a case, and when exceptions taken at a trial are reserved to be heard by it in the first place. (§ 265.) The Code recognizes the granting or refusal of a new trial by an order (§ 11), and extends the appellate jurisdiction of the Court of Appeals to such order "as an actual determination by the general term" (*Ib.*), although the determination of the Court of Appeals therein is termed distinctively a "judgment." (*Ib.*)

These various provisions of the Code seem to make a decision of a court at general term, affirming or reversing a judgment of the same court at special term, according to the nomenclature of the Code, a mere "order." The technical "motion" (§ 401, subd. 1) disposed of thereby (*Ib.*, § 400) being an "application" to vacate the judgment and grant a new trial. The judgments mentioned in sections 19 and 38 of the Code probably were intended to embrace every kind of decision, since otherwise less than the number of judges specified in such section might grant or refuse an order for a new trial. In this case, therefore, the decision of the general term was a mere order, and should have been entered as such in writing before it could take effect. If it had been a judgment and merely orally announced, such announcement would unquestionably in such a case authorize the reduction of the decision to form, and justify a settlement and allowance of its written record subsequently, although all the judges who made it should not then be members of the court. And in such case, such record, when made, would relate back to the time of such announcement.

The stay of proceedings in this case was by statute, and not by a special order of the court. In the latter case the defendant's remedy might have been confined to a motion for an attachment for disobedience of such order. In the former it is irregular to proceed, and the proceedings may be set aside as void. The order at general term affirming the judgment at special term related back to the time of pronouncing the decision. The anticipation of it by issuing the execution was a mere irregularity; the levy of such execution on the day it was issued was notice of its issuing. I fully concur, therefore, in the views of my brother Monell, in considering the right to move to set it aside waived by five months' delay in making the motion.

The order appealed from should be reversed, without prejudice to a motion by the defendant to stay the proceedings on suitable terms.

McCunn, J.—I agree fully with the chief-justice and with Justice Monell, that the order appealed from in this case should be reversed; but I differ with them widely in my reasoning, in arriving at this conclusion; I believe the theory or practice laid down by the learned counsel for the plaintiff is the correct practice.

The learned justice who heard the case below misapprehended the fact, in assuming that no judgment-roll was filed till June 2, 1864, for the judgment-roll in the case was undoubtedly filed in February, 1864, and the execution fully refers to this judgment and its entry; and he was mistaken, therefore, in his reason for granting the motion. He evidently based it on the supposition that a new judgment had been entered up for costs at general term, for he certainly did not refer to the original judgment, which was affirmed, because to that judgment the execution, which defendants are now moving to set aside, fully and completely refers.

The practice is well settled, that where a judgment is affirmed, it does not add to or modify the original judgment; it remains as when entered up originally. The rule is simply to enter up a new judgment for the costs; so that, in fact, there are two judgments in the case—the original judgment and the judgment for costs. Supposing no costs or disbursements had been al-

lowed to either party on this appeal, certainly no second judgmend would have been entered. All that could have been done, under such circumstances, was to obtain from the clerk at general term a certified copy of the order affirming the judgment; and the filing of that with the clerk of the court in which the judgment was first entered, is all that would be necessary. (2 *Tiffany & Smith's Pr.*, 153.)

This was all done by the plaintiff in this action; and this, I hold, was all he was required to do. After the court had determined the case, it must give effect to its determination as of that date, and all orders concerning the same must be as of that date. (Wilson *a.* Henderson, 15 *How. Pr.*, 90; and Crawford *a.* Wilson, 4 *Barb.*, 504.)

The judgment of affirmance, when entered, must refer back to the day and term it was pronounced. (Rochester Bank *a.* Emerson, 10 *Paige*, 359.)

In this judgment (the judgment below) the plaintiff cannot take any proceedings on the same, founded on the act of the general term. This execution is founded on the original judgment alone, and whatever rights or liens are acquired by a levy under it must be treated as vested rights. (Matter of Berry, receiver, 26 *Barb.*, 55.)

It has been held in the case of Jackson *a.* Varick (7 *Cow.*, 413), that on a case and bill of exceptions the prevailing party may take the effect and advantage of the decision the moment it is announced.

I am not insensible to the value of the arguments which have been advanced to us by the learned counsel for the defendant. These arguments raise one of the many difficulties I have found in the case. They do not, however, affect my view as to the conclusions we should arrive at.

The order appealed from should be reversed, but I do not concur with the learned chief-justice that it should be reversed with privilege to renew, &c. I agree with Justice Monell, that the order should be reversed unconditionally, and with costs.

MONROE *a.* GALVESTON, &c., RAILROAD COMPANY.

New York Superior Court; Special Term, May, 1862.

PARTIES IN CREDITOR'S SUITS.

In a creditor's suit, the judgment-debtors must be made parties by the service of process. It is not enough to name them in the proceedings as defendants.

This action was brought by Caleb S. Monroe and another against the Galveston, Houston, and Henderson Railroad Company and others, as defendants, to have assets of the company applied to payment of the plaintiff's judgment against it.

ROBERTSON, J.—This is a creditor's complaint against a foreign corporation, who are made parties to the suit; but no service has been made upon them of any summons to bring them within the jurisdiction of the court.

They are clearly necessary parties to the action, and they are not made parties simply by naming them as such. I do not think the 270th section of the Code will cover such a case, as no future judgment can be made against the company distinct from that to be made against the other defendants. They must therefore be brought in before the action is in readiness for hearing.

BETZ *a.* BETZ.

New York Superior Court; General Term, June, 1864.

SUPPLEMENTAL ANSWER IN DIVORCE.—CONDONATION.

An offer by a wife to return to her husband and live with him, if made pursuant to an order of court, for her support in lieu of an allowance, or if not accepted, or made upon conditions which the husband does not comply with, is not a condonation of his previous cruel treatment and abandonment of her.

Betz *a.* Betz.

A supplemental answer in an action by her for a limited divorce, setting up only such facts, does not show a defence; and leave to put in such an answer should be refused.

This was an appeal from an order denying the petition of the defendant for leave to put in a supplemental answer in a suit for a limited divorce for alleged cruelty and abandonment.

The facts were as follows:

After the commencement of the suit, and on the 21st of March, 1863, upon an application made for alimony *pendente lite*, the court directed, by its order, that "the plaintiff must offer to return to the society of the defendant, in case he shall provide a place for her support, within a week from the making of this order; and, in case she does so, the defendant must provide such place and support. If she does not, the motion must be denied: if she does, and he does not supply such place and support, there must be an order for his allowing $8 a week until the determination of the cause, and $30 counsel-fee."

The plaintiff being quite poor, and having no means of support for herself and her infant child, thereupon offered to the defendant, in writing, to return to his society, on his providing a suitable abode and support for her in accordance with the terms of the order. Seventeen days afterwards the defendant notified the plaintiff that he had, in pursuance of the order of the 21st March, and the offer of the plaintiff under said order, provided a suitable place for her abode at No. 1258 Broadway, and also a suitable support for her at said house.

The plaintiff, thereupon, caused the proposed residence to be examined; and finding it, in her opinion, unsuitable, declined to reside there, and notified the defendant thereof.

The proposed supplemental answer simply averred that, on the 25th of March, 1863, the plaintiff offered to return to the society of the defendant on his providing a suitable place of abode and support for her; that on the 11th of April, 1863, the defendant offered to and did provide a suitable abode and support for her, and offered to receive her back, and that she refused, and still refuses to accept such offer.

Leave to interpose this answer was applied for and refused at special term, and the defendant appealed.

Cram & Robinson, for the defendant, appellant.

Kapp & Goepp, for the plaintiff, respondent.

By the Court.—Barbour, J. (after stating the facts.)—The defendant claims that this offer of the plaintiff to return to her husband and live with him was a condonation of the injuries complained of, and therefore constitutes a bar to further proceedings in the action.

But I am satisfied, upon an examination of the authorities, that this position cannot be maintained. For the proposed supplemental answer does not aver that the offer of the wife was accepted by the defendant; and it expressly states that his offer, which was not made until the lapse of seventeen days, and which appears from such supplemental answer to have been a distinct proposition on the part of the husband, entirely unconnected with the offer the plaintiff had previously made to him, was refused by her.

There was no time, therefore, when the minds of the parties met upon the offer on the one side to forgive, upon the specified conditions, and the acceptance of such forgiveness and the performance of those conditions by the other; and an act of condonation, to be effectual, must be one to which both husband and wife assent, and in which each participates.

An unaccepted offer to return to the matrimonial bed is not, of itself, a condonation, but only an expression of a willingness to condone. In the case made by the supplemental answer, it was at most merely the expression of a desire on the part of the plaintiff to make an agreement with the defendant whereby the injury should be condoned at a future period, and on the latter's assenting to and performing certain conditions. That was not a condonation. (See 2 *Bishop*, 347; Popkin *a.* Popkin, 1 *Hagg. Ecc. R.*, 766; Ferrars *a.* Ferrars, *Ib.*, 781, n.; Quarles *a.* Quarles, 19 *Ala. R.*, 363; Peacock *a.* Peacock, 1 *Swab. & Tr.*, 183.)

Again: the term condonation necessarily includes that operation of the mind, evinced by words or acts, known as forgiveness—the free, voluntary, and full forgiveness and remission of a matrimonial offence. Unless accompanied by that operation of the mind, even cohabitation without fraud or force is in-

sufficient to establish a condonation. (2 *Bish. Mar. Div.*, 52; D'Aguilas *a.* D'Aguilas, 1 *Hagg. Ecc. R.*, 773; Popkin *a.* Popkin, *supra;* Curtis *a.* Curtis, 1 *Swab. & Tr.*, 192; Reese *a.* Reese, 23 *Ala. R.*, 785.)

In this case it appears to me there is no evidence of an intention on the part of the wife to forgive her husband voluntarily and to reinstate him in her affections, nor even to abandon her suit. But, on the contrary, it is quite clear that her offer to the defendant was made for the purpose of obtaining a support for herself and her child during the pendency of the suit, and because the order of the court required her to do so, as a condition upon which such support was to be obtained. It was intended by the court as a substitute for an award of alimony during the progress of the suit, and was so accepted and acted upon by the plaintiff.

The proposed supplemental answer, therefore, would have constituted no defence, and, for that reason, the rejection of the petition was proper.

The order should be affirmed, with costs.

WOODRUFF *a.* VALENTINE.

New York Superior Court; Special Term, March 1865.

FRAUD.—ARREST.

A deceit practised by one of several joint debtors in inducing the creditor to accept his check, post dated, and indorsed by the other, is not a ground for authorizing his arrest in an action on the check against both.

Motion to vacate an order of arrest.

The facts are stated in the opinion.

MONCRIEF, J.—An order of arrest has been granted in this action against one of the defendants, upon the ground, as ap-

pears by the affidavit of the plaintiff, that said defendant was "guilty of a fraud in incurring the obligation for which this action is brought."

The facts of the case, as presented by the papers used by the respective parties upon this motion, may be stated briefly thus: On the 19th day of December, 1864, the plaintiff sold and delivered certain cattle to the defendants, without any thing being said as to terms of payment or otherwise, except as to the price to be paid therefor; that on the 21st day of December, 1864, the plaintiff applied to the defendant Washington Valentine for payment, who replied that he was not in readiness to make immediate payment; and it was arranged that the plaintiff would accept the check of Washington, payable in twenty days, if the same was indorsed by Peter Valentine; that a check so indorsed was accordingly made and delivered to the plaintiff, upon which check this suit is brought.

The plaintiff alleges that the defendant Washington made false representations as to his means, &c., at the time when said check was accepted. This is denied by the defendants.

Judgment has been entered against the indorser of the check, against whom no order of arrest was issued.

It is a sufficient answer to make to the argument to sustain the order of arrest, to say that this is not an action to recover upon an obligation incurred by the defendant's fraud. The action is to recover a debt, whereof the check is evidence.

Whether or not the plaintiff could have resorted to an action against the defendants upon all the facts set forth in his papers, need not be discussed; he has chosen to elect to prosecute his claim upon the check, and the order of arrest cannot be sustained.

The defendants "incurred an obligation" to pay the agreed price upon the delivery of the cattle, either upon demand or upon the expiration of such period of credit as might be shown to be customary when no time is prescribed for payment. If, upon demand being made, one of the defendants, by deceit, misrepresentation, or fraud, induced the plaintiff to give a longer credit, such facts might also probably give a right of action against such wrong-doer, but cannot aid in supporting an order of arrest in an action brought upon the check.

Upon the defendant stipulating not to sue, the order of

arrest must be discharged, with ten dollars costs, to be paid by the plaintiff.

GROSS *a.* GRAVES.

New York Superior Court; Special Term, October, 1864.

ARREST.—EXCUSE FOR NOT PAYING OVER MONEY.

The fact that a third person had interposed some claim to moneys which the defendant had received in a fiduciary capacity for the plaintiff, wherefore he refused to pay it over lest he should be liable, does not affect the plaintiff's right to have the defendant arrested in an action to recover such money.

Motion to vacate an order of arrest.

The defendant, as the attorney of the plaintiff, received, for her, money paid into court for her use in a former action, but refused to pay it over to her, on the ground that the defendant in such former action, who had paid it into court, had some claim thereon. She brought this action to recover the amount; and having obtained an order for his arrest, he now moved to set it aside.

MONCRIEF, J.—It is admitted by the defendant that he received money as the attorney for the plaintiff, and that he has not paid the amount so received, or any part thereof, over to her. Under such circumstances, the plaintiff is entitled, of course, to an order of arrest under subdivision 2 of section 179 of the Code; and upon obtaining judgment in this action, can issue an execution against the person of the defendant, irrespective of an order of arrest having been granted. If the defendant believed that the defendant in the action in which the money was paid into court would have a legal claim against him in case the money was paid to the plaintiff, he possibly could have relieved himself from all apprehension by obtaining leave to pay the money back into court. Whether the plaintiff will recover the whole amount claimed by her, or the defend-

ant allowed to set off charges for services alleged to have been rendered, will be best ascertained upon the trial of this action.

I am constrained to deny the motion to discharge the order of arrest, with $10 costs.

FINCH *a.* PINDON.

New York Superior Court; Special Term, April, 1862.

WITHDRAWING ANSWER.—DEMURRER.

The court will not, without special reasons shown, allow a defendant, after having interposed an answer, to withdraw it and put in a demurrer instead.

Motion for leave to demur.

In this action, and another by another plaintiff against the same defendant, the defendant, after issue of fact joined, moved for leave to withdraw her answer and put in a demurrer to the complaints.

ROBERTSON, J.—No reason has been furnished, in this case, why the defendant put in an answer instead of a demurrer in the first place. An answer enables the plaintiff to amend his complaint on the trial, and waives a great many objections in regard to irregularity, motions to strike out, and the like. The defendant has the benefit on the trial of every objection, except technical rules, that could be taken by demurrer. The Code seems to favor other modes of defence rather than demurrers. After the defendant made her election as to the time and mode of objecting to the plaintiff's right to recover by putting in an answer, it is too late to change her mind. The mere consideration of diminishing expense should have been thought of before. This application assumes that it is a matter of course to allow this step to be taken. I am not aware of any such practice, although there may be to withdraw a demurrer and put in an answer on paying costs.

The motions in each of the above cases must be denied, with $7 costs, to be costs in the cause.

CLOUGH *a.* MURRAY.

New York Superior Court; General Term, November, 1862.

PLEADING.—ANSWERS.

Although the Code does not expressly require the defendant, in his answer, to state the relief he demands, he must set forth whether he interposes a mere defence or a counter-claim.

An answer, setting up as a defence a failure of consideration, must state whether it is a partial or total failure.

Appeal from an order.

A. M. C. Pennington, for defendants, appellants.

G. W. Cotterell, for plaintiff, respondent.

BY THE COURT.*—ROBERTSON, J.—The order appealed from, in this case, directs all of what purports to be an answer in this case, after the first defence, to be stricken out. The order does not furnish the ground of the decision. It must, therefore, be assumed to be for its being sham or irrelevant. (Briggs *v.* Bergen, 22 *N. Y.*, 163.) Where the whole is stricken out, it must be on the ground of its entire failure as a defence. (Stark *v.* Colton, 2 *E. D. Smith*, 398.) It is true, separate motions may be made to strike out matter as irrelevant or redundant, or to make the allegations of a pleading more definite and certain, when the precise nature of the charge or defence is not apparent. Redundancy is held to be a needless repetition of material averments (Bowman *v.* Sheldon, 5 *Sandf*, 660); and irrelevancy is where matter is inserted in a pleading having no bearing on the subsequent matter of the controversy, and not affecting the decision of the court. (Fabricotti *v.* Launitz, 1 *Code R.* (*N. S.*), 121; Seward *v.* Miller, 6 *How. Pr.*, 313.) It has also been held, that matter which is neither a counter-claim nor defence may be stricken out as irrelevant. (Kurtz

* Present—ROBERTSON, WHITE, and MONELL, JJ.

v. McGuire, 5 *Duer*, 660.) The answer in question may not, within such definitions, strictly have redundant allegations, or be entirely irrelevant; yet it does not show whether the matter set up in it is alleged as a counter-claim for moneys due him, or a defence of failure of consideration. Defences and counter-claims are carefully separated in the Code. For the excess of a set-off beyond the plaintiff's claim judgment may be rendered (§ 263), and the court may grant to a defendant any affirmative relief to which he may be entitled. (*Code*, § 274, subd. 2.) An answer must contain a statement of new matter *constituting a defence or counter-claim in ordinary and concise* language, without repetition. (*Code*, § 149, subd. 2.) The defendant may also set forth in his answer as many defences and counter-claims as he may have. (§ 150.) They must, however, be separately stated *in such a manner that they may be intelligibly distinguished*, and the answer may be demurred to if it contain matter which is neither a counter-claim nor a defence. (§ 153.) If the plaintiff fail to demur to a counter-claim, the defendant may move for judgment. (§ 154.) It is true, the Code does not expressly require the defendant to set forth the relief he demands, as it does the plaintiff (§ 3); yet I think the spirit of the foregoing sections requires him to set forth whether his defence is a counter-claim, requiring a reply, or a mere defence, and that he should do so by either setting up such matter as a counter-claim, or praying permission to set it off. (Bridge *v.* Paysen, 5 *Sandf.*, 210. See, also, Wright *v.* Delafield and others, in Court of Appeals, June Term, 1862.) Besides this, a defendant should set forth, whether his defence, if of a failure of consideration, is for a partial or total one. (Bush *v.* Prosser, 1 *Kern.*, 352; McKyring *v.* Bull, 16 *N. Y.*, 257), as it does not amount to a counter-claim. (Gleason *v.* Moen, 2 *Duer*, 640; Barn *v.* Baker, 9 *Mo. R.*, 840.) If it did, the plaintiff might be entitled to apply for judgment for the difference. (*Code*, § 246, subd. 2.)

[After reviewing the allegations of the answer in question, which was very voluminous and peculiar, the opinion concluded as follows:]

It is evidently impossible to separate the relevant from the

irrelevant matter in this answer. For these reasons, as well as those given by me on the opinion delivered at special term, the order appealed from must be affirmed, with costs, and the defendant have leave to amend his answer in twenty days, or filing an affidavit of merits and paying such costs in five days. Upon the merits of the defence in such answer, if any, we do not undertake to pass.

THE PEOPLE *on rel.* SPRINGSTEEN *a.* POWERS.

Supreme Court, First District; General Term, May, 1865.

APPEAL FROM JUSTICES' COURTS.—CLERKS OF JUSTICES' COURTS.

A defendant in proceedings in a justice's court, who does not appear before the justice on the return-day of the summons, is precluded from objecting, on appeal, to the regularity of the proceedings.

The relator in a certiorari to review proceedings in a justice's court is concluded by the return of the justice. If the facts are not correctly stated he should apply for a further return; he cannot correct it by affidavit or assignment of errors.

Where an affidavit is required by law to be taken before the clerk of a District Court, it may be taken before the deputy, and the latter may in such case properly sign the name of the clerk.

Certiorari to a District Court.

The relator sued out a writ of certiorari, directed to F. W. Loew, Esq., justice of the fifth judicial district in the city of New York, requiring him to send the record of proceedings, had before him on the application of John Powers, for a warrant to dispossess the relator, and one Cutter, of certain premises in the city of New York, with the process, warrant, &c., to the justices of the Supreme Court at the general term thereof, &c.

In obedience to this writ, the justice made his return, from which it appeared, that on the 7th day of November, 1864, Powers made an affidavit, showing the relation of landlord and tenant to exist between himself and the relator; and that the relator held over after default in the payment of the

rent due on the 1st day of November then instant,—which affidavit purported to have been sworn before E. F. Purdy, Jr., clerk of the First District Court, and was used before the justice as the foundation of the proceedings in question, but was without any revenue stamp;—that the justice issued a summons, requiring the relator to show cause before him why the possession of the premises in question should not be delivered to the landlord.

It also appeared from the return that one S. J. Schick made an affidavit that he delivered a copy of this summons to a person of mature age, who at the time was on, and resided on, the premises in question, and that he at the same time showed the original—"the tenant being absent therefrom, his last usual place of business"—which affidavit purported to have been sworn before E. "F. Purdy, Jr., clerk;"—and that the landlord appeared before the justice, and demanded the rent, and possession of the premises for non-payment of rent; and the tenant not appearing, judgment was rendered, that the landlord have possession of the premises, for the non-payment of rent, and that a warrant be issued to remove the tenant.

It further appeared that a dispossessing warrant was issued by the justice without seal. Endorsed upon this warrant, under date of December 2, was the return of a marshal, to the effect, that he had fully executed the same.

The relator thereupon by way of assignment of errors, filed an affidavit of S. J. Schick, setting out that the affidavits above referred to were never sworn before Purdy, the clerk of the court; but that his name was affixed thereto by one Nash, who pretended to administer the oath.

I. T. Williams, for the relator.—I. The return does not show that any jurisdiction over the person of the relator was acquired by the justice. There is no evidence that the summons was served upon the relator.

The statute requires that service of the summons be made by a marshal of the city of New York. (*Sess. Laws*, 1864, 1311, § 2.)

There can be no service but by a strict compliance with the requirements of the statute. (People *ex rel.* Cole *a.* Alden, 26 *How. Pr.*, 166; Cornell *a.* Barnes, 7 *Hill*, 35.)

There was no appearance on the part of the relator before the justice.

The justice returns the affidavit of one Schick, setting forth what is claimed to be a service of the summons. This affidavit, even if service by Schick would have been good service, is not evidence of such service, for it was not sworn before the person before whom it purports to have been sworn. It could not, therefore, be legally read before the justice. (Norton *a.* Colt, 2 *Wend.*, 250.)

II. The justice got no jurisdiction over the subject-matter of the proceeding.

The affidavit of Powers is the paper relied upon as conferring this jurisdiction. To be of any validity in this proceeding, such affidavits must be sworn before the clerk of the court or his deputy. (*Act of* 1863, *Sess. Laws*, ch. 189, § 1; also, People *ex rel.* Cole *a.* Alden.) That paper was not sworn to before the Clerk, Purdy, but his name and certificate were affixed to it by one Nash, in his absence. This paper is not an affidavit. (2 *Rev. Stat.*, 284, § 49.)

This certificate, by such officer, is a condition precedent to the right to read or use it. The statute, in effect, prohibits its use until that is done. (*Ib.*, 513.)

Jurisdiction is conferred upon the officer, not by the existence of a fact, but by evidence of a fact. When the statute prescribes what the evidence shall be, no other evidence will answer the purpose.

III. The affidavit of the landlord is void for want of a revenue stamp. *Rev. Act of* 1864, §§ 158, 163, 170.)

IV. The warrant is void for want of a seal, and must be set aside for that reason. (Smith *a.* Randall, 3 *Hill*, 495; People *a.* Holcomb, 3 *Park. Cr. R.*, 656; 20 *Wend.*, 67.)

It is competent to assign errors of fact.

"It is done by setting them out at length in an affidavit, a copy of which is served on the opposite party before or at the time of serving notice of argument of the return." (See *Townshend's Landlord & Tenant Pro.*, 136; *Tidd's Pr.*, 1108, 1118; Harvey *a.* Reckitt, 15 *Johns.*, 78; 12 *Wend.*, 266; 5 *Den.*, 66; 3 *Cai.*, 106; 3 *Seld.*, 576; 13 *Wend.*, 575.)

John Graham, for the respondent.—I. The court will intend

that the oaths were properly administered: this is merely to intend that the ministerial duty to be performed by the clerk or his deputy, who alone could administer the oaths under the circumstances, was regularly and faithfully performed. It is not violative of that rule which forbids intendments in favor of the jurisdiction of a court of limited jurisdiction, for that relates to facts which the record does not show. Here the court is asked to presume no fact in favor of Justice Loew's jurisdiction.

The appellants say the facts are false. They must prove it. This court must take them to be true, and that every fact transpired as the return states it, unless the contrary is shown by the appellants. These facts are certified by public officers, whom the law accredits. Taking what they alleged to be true, were the proceedings below legal? (1 *Greenleaf on Ev.*, §§ 1344–'87–'88–'89.)

II. As Schick's affidavit does not deny it, and as the respondent's affidavit to found the dispossessing proceedings had to be sworn to before the clerk or his deputy, one or the other, it is safe to assume on Schick's affidavit, administered the oaths in question. (See *Practice of the District Courts in the City of New York*, Voorhies' ed. of 1857, 44, 45, §§ 71, 75; also, 3 *Rev. Stat.*, 5 ed., 474, § 38.)

Although the People *a.* Alden (26 *How. Pr.*, 166) holds that the affidavit to found process of this kind must be sworn to before the clerk or his deputy, as required by section 1 of chapter 189 of Laws of 1863, it does not prevent the deputy administering the oath in the clerk's name, as required by section 71 of the District Court Act.

Wherever a presumption of law is disputed, the proof must be direct and positive, putting "a direct negation" upon the fact as the law presumes it. (Downing *a.* Rugar, 21 *Wend.*, 178.)

III. As to the point that the summons to the tenant and under-tenant should be served by a marshal of the city of New York, the statute cited in the appellants' first point, while it directs the service to be so made, does not invalidate it, if made conformably to the Revised Statutes. (3 *Rev. Stat.*, 5 ed., 837, § 32.)

The Revised Statutes do not designate the person by whom the summons shall be served; but even if a marshal is essential

to a valid service, will not the law presume that Justice Loew issued his summons to a marshal to be served? Must he take proof of the fact and return it to the court? (1 *Greenleaf on Ev.*, § 92; McCoy *a.* Curtice, 9 *Wend.*, 17.) Besides, the summons, unlike other process, runs to the tenant and undertenant, and is not directed, like the warrant to dispossess, to a public officer.

IV.—The affidavit of Mr. Powers, to found the dispossessing proceedings, did not require a revenue stamp. (*Act of Cong.*, June 30, 1864, as amended by Act of March 3, 1865, § 158; *Ib* Schedule B, tit. "Certificate" and "Legal Documents," "Writ," &c.)

The commissioner of internal revenue has decided that the exemption to "affidavits in suits or legal proceedings" applies wherever the inceptive process pays a fifty cent stamp. In the present case the affidavit of the landlord and the summons to the tenants are on the same side of the same sheet of paper, and the stamps can be applied to either document in the discretion of the court.

V. As to the warrant of dispossession, the statute does not say that it shall be sealed. The word clearly imports authority, mandate, something which shall be a warrant or justification to the officer for executing the judgment, &c. The practice in this city has never been to seal these warrants.

A seal to a warrant is not usual or necessary, unless it is expressly required by particular act of parliament. (*Willes R.*, 411; *Bull. N. P. C.*, 83.)

By the Court.—Ingraham, P. J.—The non-appearance of the appellant before the justice on the return of the summons precludes him from objecting, on appeal, to the regularity of the proceedings before the justice. This was held by the general term of this district in The People *a.* Ulrich (2 *Abbotts' Pr.*, 28).

Even if he could now appeal, he is concluded by the return. If the return does not show the facts relied on, he should have applied for a further return. He cannot contradict the return on a matter of jurisdiction, by an assignment of errors. Such could not be done when the practice was to serve a formal assignment of errors which the respondent had the opportunity

of answering by a joinder in error. The same reason applies with more force if the affidavit used in this case is to be considered an assignment of errors. This was so held in Harris and others *a.* The Judges of Westchester (20 *Wend.*, 625). Cowen, J., says: "The return cannot be contradicted by an assignment of errors. It must be taken as conclusive, and acted upon as true. It is supposed that an assignment of want of jurisdiction constitutes an exception to the rule. This is certainly not so, where the officers return that they have jurisdiction; nor am I aware that an issue has ever in any case been raised upon jurisdiction by an assignment of errors."

The writ of certiorari in this case is issued under the provisions of the Revised Statutes, and the court has power under that writ to examine all the decisions of the justice either upon matters of law or fact, (1 *Seld.*, 383; 2 *Ib.*, 309; 25 *Wend*, 280); but such decisions to be reviewed by this court must appear upon the return, and cannot be heard in any other manner.

The decisions above referred to appear to dispose of this proceeding.

1st. Because the relator, not having appeared before the justice, is precluded from objecting to the regularity of the proceedings.

2d. Even if he can appeal on matters of jurisdiction, he cannot raise such a question by affidavit where the return does not show the facts relied on.

If the return is imperfect, the relator should have applied for a further return. Whether or not the affidavits were sworn to before the clerk, could be returned by the justice.

It is not necessary for us, therefore, to express any opinion upon the merits, nor can we decide the point upon which the relator claims the want of jurisdiction to be founded, because it does not now appear whether the affidavits were taken before the deputy clerk or not. If such was the case, and the jurat to the affidavits were signed by the deputy in the name of the clerk, we think the same were valid and authorized by the 71st section of the act relative to these courts (1 *Laws of* 1857, 707), which says: "The clerk may, by an instrument in writing filed with the justice, appoint a deputy who may in his name perform all the duties required of the clerk."

The intention was to confer upon the deputy similar authority

as that of deputy clerks in courts of record, who have invariably exercised such power.

Judgment for the respondent.

THE MADISON AVENUE BAPTIST CHURCH *a.* THE BAPTIST CHURCH IN OLIVER STREET.

New York Superior Court; Special Term, April, 1865.

DISSOLUTION OF RELIGIOUS CORPORATIONS.—POWERS OF THE SUPREME COURT OVER THEIR REAL ESTATE.—MORTGAGEES IN POSSESSION.

Religious corporations can only be dissolved by the Legislature. The consent of a majority of the corporators, with the direction and order of the Supreme Court, will not effect a dissolution.

The power of the Supreme Court over the real estate of a religious corporation is limited to the sale thereof, and does not extend to authorize a gift or surrender of such property.

The purchase of a mortgage, on which no default has been made, by a party in the wrongful possession of the mortgaged premises, gives him no right to hold the property as mortgagee in possession.

Trial by the court.

The majority of the congregation of the plaintiffs' church, through their officers, agreed with the congregation of the Oliver-street Baptist Church that the former congregation should cease to exist; that the plaintiffs' property should be conveyed to the defendants, and the two congregations be united and worship together in the Madison Avenue Church. An order was made in the Supreme Court, upon the application of the parties, confirming this arrangement, and directing a transfer and conveyance in conformity thereto. Under this conveyance the defendants entered into possession of the premises, and subsequently bought in a mortgage on the premises, on which the principal was already due, but on which no default in payment of interest had been made. After the action was commenced

they bought in a second mortgage. The defendants also paid some debts of the plaintiffs. The Madison Avenue Church having brought an action of ejectment to recover possession of their church, the defendants set up the above facts in defence, and claimed to hold under the conveyance and as mortgagees in possession.

McCunn, J.—This is a controversy between two religious corporations.

The Madison Avenue Baptist Church brings ejectment against the Baptist Church in Oliver-street, to recover possession of their church-property in Madison Avenue.

The congregation of the Oliver-street Church allege that they should not be ejected, because they say the two corporations or societies, by a majority of their members, at regular meetings, agreed that the church or corporation in Madison Avenue should cease to exist, and that all its property should be merged in or conveyed to the corporation of the Oliver-street Church; and that the members of both churches should worship together thereafter in the Madison Avenue Church; and that the Supreme Court, upon the application of the parties, directed an order and transfer to that effect. They further claim to hold the property as mortgagees in possession.

The Madison Avenue people allege, in answer to all this, that the proceedings taken by the majority of the two congregations, and the action taken by the Supreme Court thereunder, were insufficient, in law, either to dissolve the corporation of the church in Madison Avenue, or to convey their property, and that the mortgages under which defendants claim to hold possession were not due at the time of the commencement of this action.

The only power that can dissolve a religious corporation is the power that creates it, or brings it into existence, to wit, the Legislature, or a Court deriving authority therefrom for the purpose; and that power not having been invoked in this case, the joint efforts of the two corporations, and the action of the Supreme Court in the premises, were ineffectual to accomplish the purpose. Religious societies have no power or authority to dispose of their real estate, except what is contained in the Revised Laws of 1813; and agreeably to this Act, it is lawful

for the Supreme Court, upon the application of any religious corporation, to make an order for the sale of the real estate of said corporations, and to direct the application of the moneys arising therefrom to such uses as shall be most to the interest of the society to which the real estate belonged; but it will be thus seen, that the authority conferred by the statute is not only confined in terms to a sale, but the intention of the Legislature is placed beyond doubt, by requiring the Court, when it orders a sale, to direct the proper application of the proceeds of such sale. Now, it is quite clear that the jurisdiction conferred on the Supreme Court under this act, being of a special and statutory character, is not a part of its general jurisdiction, and, therefore, the court cannot exceed the limits marked out by the statute; and if it does, its proceedings will be entirely null and void. (Wheaton *a.* Gates, 18 *N. Y.*, 395.)

The proceedings in this case show an attempt to form a union between the plaintiffs' and the defendants' societies, but the mode adopted for accomplishing that object resulted, if valid, in the complete extinction of the plaintiffs' church and of their corporate existence, and the transfer of all their property to the defendants; and that, too, without any consideration. As it appears that the sum mentioned in the deed was merely nominal, the conveyance, therefore, by plaintiffs' society, was an absolute gift to the defendants. Whereas, the defendants claim to be absolute owners of the property by purchase, and, with a view to bring the conveyance within the authority of the statute of 1813, they expressly claim to treat the transfer as a sale.

The order, however, did not direct a sale, but a conveyance, and the conveyance thus directed and made was wholly destitute of the distinctive element of a sale, and was, therefore, null and void.

There is another objection to the defendants' title, which is equally fatal. In the case of Wheaton *a.* Gates, the Court of Appeals established the important principle, that the 11th section of the Act of 1813 does not confer upon the courts an unlimited authority, even to order a sale of the real estate of religious corporations; that it merely adds, in fact, another requisite to the validity of a sale; and that the court can only order such a sale as it would have been right and lawful for

the trustees themselves to make, if there had been no special statute upon the subject.

It was accordingly held in that case, that an order directing a sale of the real estate of a religious corporation, for the purpose of paying its debts and dividing the surplus among the pew-owners, was wholly void.

The court says: "The trustees had no authority to distribute the property of the society among its individual members, or any class of them. Their duty was to preserve and administer it in the promotion of the purposes for which the corporation was created, and that it was not in the power of the trustees, or a majority of the members of the society, or the court, or all of these authorities together, to abolish the corporation or dissolve the society."

This decision is directly applicable to the present case, and its authority must be controlling. We have seen that the direct effect and object of the so-called union between the plaintiffs and defendants was to abolish the plaintiffs' corporation, and dissolve their society; and although their property was not to be divided among their individual members, as in the cases cited above, it was to be given to another religious organization, which is equally objectionable.

It is sufficient for me to say, that if they desired to accomplish a union of the two churches, their proper course was to apply to the Legislature. (*Willard's Eq. Jur.*, 374–5.)

I have been thus brief in disposing of the first question presented, believing that the principle involved is fully discussed and settled in the case of Wheaton and Gates, and I think the remaining questions in this case can be as easily disposed of.

The defendants alleged and offered to prove that on the 2d of May, 1863, they purchased a mortgage for $12,500 on the property in question, which, by its terms, became due on the 1st of February, 1860, and that on the 17th of October, 1863, they purchased another mortgage on the same property for $30,000, and they claim the right to hold possession of the property until their mortgages are paid. The second one was not acquired until after this action was commenced, and although the first one was acquired before the commencement of the action, yet there was no default in the payment of either principal or interest until afterwards.

To hold possession of property simply as a mortgagee is not entitled to favor.

A mortgage is now regarded in this State as simply the security for the payment of money, to be made effectual by the process of foreclosure. This is the rule laid down in the case of Waring *a.* Smith (2 *Barb. Ch. R.*, 119, 135), in which the chancellor says that the only right a mortgagee has in the land itself is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. (See also Russell *a.* Shy, 2 *Blackf., Ind.*, 575–579; Levy *a.* The Mayor, &c., of New York, N. Y. Superior Ct., February, Gen. Term, 1865.)

It will be seen, therefore, that the defendants had no right of possession when this action was commenced, for neither of the mortgages was then due. Nor did the mortgagees originally enter as such at all, for neither of the mortgages was acquired till long afterwards, nor have they ever been in possession, with the assent of the mortgagor, after the mortgages became due. They must therefore be left to their remedy of foreclosure.

In regard to the bonds held by the defendants, secured by a mortgage given to other parties in trust, it is only necessary for me to say, that the defendants do not hold the mortgage.

The defendants also allege and offer to prove, that they have paid certain of the plaintiffs' debts, pursuant to the terms of the attempted union, and for the money thus paid they are understood to claim a lien upon the property.

If this claim is well founded, it would furnish the means of rendering the statute a complete nullity, for it would be useless to require religious corporations to apply to the court, before making a direct sale of their property, if they may indirectly, by creating liens and incumbrances upon it, dispose of it at pleasure.

I know it has been held that a vendee, who has advanced money on the faith of a valid contract for a conveyance, is entitled to a lien on the property for the money so advanced. But in the case of religious societies there cannot be any valid contract for a conveyance; the statute absolutely disables them from making such contracts. A purchaser from a religious society must rely solely upon the order of the court, and the

deed executed in pursuance of it; and if these are both void, as in the present case, they must be void to all intents and purposes. And in addition to all this, the settled rule is to the effect that there can be no lien for money paid upon the faith of an invalid contract. (Ewing *a.* Osbaldiston, 2 *Mylne & C.*, 53.)

And, further, the money having been paid in pursuance of an arrangement with the plaintiffs, and by their implied authority, it must be considered as paid to their use, and may either be recovered by an action, or set off against the rents and profits received by the defendants.

For these reasons, I therefore hold that notwithstanding the action of the majority of the members of the two corporations, and the action of the Supreme Court thereunder, the plaintiffs, the Madison Avenue Baptist Church, still exist as a corporation or society, and that the alleged conveyance made by them to the Baptist Church in Oliver-street, of the property in question is null and void, and of no effect; and, further, that at the time of the commencement of this action the mortgages under which the defendants claim to hold possession as mortgagees were not due, nor was any part thereof due, nor any interest on the same, and that, consequently, the claim to possession in that respect is not valid in law; and finally, that the defendants have no lien upon the premises for moneys advanced by them under the alleged arrangement, and consequently the plaintiffs are entitled to judgment for the possession of the property, with costs.

Judgment for the plaintiffs accordingly.

WALKER *a.* THE GRANITE BANK.

Supreme Court, First District; General Term, Feb., 1865.

DISCOVERY AND INSPECTION.

An affidavit, to support an order for the discovery of books and papers, must state specially what information is wanted, and that the books and papers referred to contain such entries; and must state this positively, not on information and belief, and the absence of a party will not excuse the want of such positive affirmation, unless the affidavit at least sets forth the sources and grounds of such information and belief.

Thus, in an action against a bank, to recover money received by it from the sale of securities deposited with it, the court will not order a discovery of entries in its books, merely upon an affidavit of the plaintiffs, alleging that he is informed and believes that there are entries relating thereto.

An order, directing the deposit of certain papers and "all other books which contain any accounts or entries, showing or tending to show" certain matters, is improper and unwarranted, it being an attempt to use the power of the court for the mere purpose of hunting for evidence.

Appeal from an order for the discovery and deposit of the defendant's books and papers.

The action was brought by Thomas G. Walker for money had and received. The complaint set forth that Holbrook, the plaintiff's assignor, in the year 1854, deposited with the defendants, as security for money borrowed from them, divers bonds and choses in action, which the defendants had disposed of at a price largely exceeding the amount of plaintiff's indebtedness; and it asked judgment for such excess, with interest, as for money had and received.

A petition was presented on the plaintiff's behalf, praying for a discovery, and alleging, on information and belief, the above facts, and that the defendants were a foreign corporation, having their place of business and books in Boston, Mass.; that the defendants had, in their answer, admitted the deposit of the stocks as collateral, but did not state what they had received for them; that they had disposed of such stocks for a large sum unknown to the plaintiff; that the ledgers, day-books, journals, bill-books, &c., of the defendants, or some or

one of them, for the years 1857, 1858, 1859, 1860, and 1861, contained entries showing when and to whom such bonds were sold, and how much was received for them; that "the books, accounts entries, account sales, bills and papers above-mentioned," were in possession of the defendants, and the production, &c., was necessary to the plaintiff, and prayed for discovery in the usual form.

This petition was verified by one of the attorneys in the form of a verification by an attorney to a complaint, giving as an excuse for its not being verified by the plaintiff, that the plaintiff had been some months in Europe, deponent averring, on his own knowledge, that the plaintiff had not the books, &c., and that, in his opinion, they were necessary to the plaintiff in the prosecution of the action, but not setting forth any sources of information or grounds of belief in the statements of the petition.

The defendants read opposing affidavits, showing, among other things, that the incorporation of the bank had expired by limitation of the charter.

The court below granted the order for the discovery, and the defendants appealed.

I. T. Williams, for the appellant.—I. The petition is not verified by the plaintiff, or by any one who has any knowledge touching the truth of the allegations contained therein. In order to render the oath of the attorney competent, he must show that he has some knowledge upon the subject, what that knowledge is, and what is the source of his knowledge, so that the court may judge of its efficiency. In the petition before the court every allegation is on information and belief, so that the oath of the attorney is only to the effect that he believes it to be true. It is not competent for the court to take cognizance of the statements contained in that petition, merely because an attorney swears that he believes them. The statute provides that, "To entitle a party to any such discovery, he shall present a petition verified by oath," *i. e.*, verifying the fact, that the books, &c., do contain evidence "relating to the merits" of the action or defence. To comply with the requirements of the statute (and a strict compliance is required) (Moore *a.* McIntosh, 18 *Wend.*, 529), it is necessary that the oath to the petition verify the fact, that the books so sought do contain evidence relating

to the merits, &c. The oath of an attorney, swearing simply to this fact upon his belief, without giving any ground or reason for his belief, is not a verification of the facts set up in the petition. (Swift *a.* DeWitt, 3 *How. Pr.*, 285.) The court must believe that the books contain the entries alleged, and that those entries are material to the issue joined in the action. This must be shown to the court by facts, and the court cannot substitute for its belief that of an attorney of one of the parties. (Opdyke *a.* Marble, 18 *Abbotts' Pr.*, 269; Davis *a.* Dunham, 13 *How. Pr.*, 425; People *a.* Rector, &c., of Trinity Church, 6 *Abbotts' Pr.*, 177; Whitlock *a.* Roth, 5 *How. Pr.*, 143; Broadhead *a.* McConnell, 3 *Barb.*, 175.)

II. It does not appear that the facts sought to be proven cannot be proven without the discovery. A commission to examine the persons in possession of the books, &c., can issue, and the contents of the books be thus ascertained. (Low *a.* Graydon, 14 *Abbotts' Pr.*, 445; Gelston *a.* Hoyt, 1 *Johns. Ch.*, 549; Opdyke *a.* Marble, *ubi supra;* McAllister *a.* Pond, 15 *How. Pr.*, 299.)

III. The order is inquisitorial and unjust. It requires an inspection or copies of all books and papers which show, or tend to show, many matters and things which can by no rational possibility be material upon the trial of the action,—an action not for an accounting but only for money had and received. But it is not for the defendant to show that these entries are not material. The plaintiff must set forth such facts as that the court can see that they are material. Such an inquisition is looked upon with disfavor by the court, and to warrant it a strong case, must be made showing its necessity. (Opdyke *a.* Marble, 18 *Abbotts' Pr.*, 270; People *a.* Rector, &c., of Trinity Church, 6 *Ib.*, 179; Lefferts *a.* Brampton, 24 *How. Pr.*, 260.)

IV. The order must be reversed as exceeding the power of the court or judge who granted it, in that it prescribes the penalty for a non-compliance with its provisions. (Broderick *a.* Shelton, 18 *Abbotts' Pr.*, 213.)

Martin & Smith, for the respondents.

By the Court.—Ingraham, P. J.—We have repeatedly held that application for discovery of books and papers must specially state what information is wanted, and that the books or papers referred to contain such entries, and this must be stated on positive affirmation, and not on information and belief. It is not enough to dispense with this positive oath that the party should be absent. If so, some other person, who has knowledge of the facts, should swear to the petition. And if there is no one who can make such affidavit, then the application cannot ordinarily be granted.

Although the plaintiff in this case was absent, still the assignor was not, and he would have more knowledge on this subject even than the plaintiff.

That the party making the affidavit in the petition had no knowledge, that the books of which a discovery is sought, contained any entries on this subject, is apparent from the manner in which such charge is made. The petition says that the ledgers, day-books, journals, cash-books, deposit-books, and bill-books, or some or one of them, for the years 1857, 1858, 1859, 1860, and 1861, contain entries showing when the bonds were sold, to whom sold, and how much were received for them; that said books also contained entries showing how much was received for interest, &c.; that the cash accounts, profit and loss account, and bills receivable account, in the ledger of the defendant, contain entries showing the same facts, corresponding to the entries in the other books.

The order appealed from, directs not only the deposit of the books before referred to, for the period of five years, but also all other books of the defendants which contain any accounts or entries, showing, or tending to show, the times when the bonds were sold, &c.

Such an order appears to me to be extending the right of a party to examine his adversary's books much beyond what was contemplated by the law, or what has ever been sanctioned by the courts.

The uniform course of decision has been against any attempt to use this power of the court for the mere purpose of hunting for evidence, without some knowledge on the part of the applicant as to what the entries are, and in what paper or book it is contained. It is very evident no such knowledge

exists in the present case, and the whole petition rests upon the supposition that there must be some entries in the defendant's books, and if the plaintiff can obtain an inspection of the defendant's books, he can obtain some information beneficial to him in conducting this prosecution. Such a rule if carried out to this extent would give to a party the privilege of always examining his adversary's books, if he can swear that the litigation relates to matters which ought to be entered in the books, and that he believes he keeps correct ones. I cannot believe that it was ever intended to carry the rules of discovery to this extent, and I am not willing to give my sanction to what seems to me to be a gross invasion of the right of a party to the control of his own books and papers. (6 *Abbotts' Pr.*, 179; 18 *Ib.*, 270; 24 *How. Pr.*, 260; Colgate *a.* Buckingham, *Ms.*, Feb., 1863.)

There are some matters concerning which discovery is sought which are stated sufficiently definitely to call for a discovery, and which, if the petition had been sworn to by a person having any knowledge in the matter, might be sustained. I refer to those parts of the petition which refer to account-sales of the bond and stock and other securities in the defendant's possession.

But the difficulty as to the proof of the existence of such papers extends to the whole petition, and in my judgment the verification should be of something more than information and belief. It may be that in some cases information from others might be sufficient,—where it is so, the information should be disclosed:

The order should be reversed, but with leave to plaintiff to renew his application upon upon other papers.

Order reversed, with leave to plaintiff to apply anew on other papers for discovery of entries to be designated in the papers.

HAYWARD *a.* THE NORTHWESTERN INSURANCE COMPANY.

Supreme Court, First District; General Term, February, 1864.

INSURANCE.—INTERPRETATION OF POLICY.

Where the printed condition of a policy excepted losses "caused by or consequent upon the bursting or collapsing of a steam-boiler or steam-pump," but the written portion insured the steam-engine; and the fire by which the insured property was destroyed, was caused by an explosion of the steam-boiler; —*Held*, that there was a repugnancy between the written and printed portions of the policy, and that the written portions must prevail.

The case of Hayward *a.* Liverpool, &c., Ins. Co. (7 *Bosw.*, 385) opposed.

Appeal from a judgment.

This action was brought on a policy of insurance, which in the written portion insured Nathaniel Hayward against loss or damage by fire, to the amount of five thousand dollars, on the buildings occupied as an India rubber factory, and on property contained therein, situate, &c., viz., $400 on their building, No. 1, on plan filed in the office of the Washington Insurance Company, New York; $1,100 on machinery, tools, steam-engine, and shafting, contained in building No. 1; $250 on stock and materials, manufactured and unmanufactured, and in process of manufacture, &c.

The policy contained a printed condition, as follows:

"This company will be liable for losses on property burnt by lightning; but not for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; *nor for any loss or damage caused by or consequent upon the bursting or collapsing of a steam-boiler or steam-pipe;* nor for any loss or damage caused by the explosion of gunpowder, percussion caps, or any other explosive substance, unless a privilege shall have been given in the policy to keep such articles."

The cause was tried before Mr. Justice Clerke without a

jury. Among other facts he found that the fire originated from, and was caused by an explosion of one of the boilers of the steam-engine belonging to and used in the rubber factory, and covered by the policy; a steam-engine being necessarily and ordinarily used in the carrying on of an India rubber factory.

In his first conclusion of law, the justice found that the loss was covered by said policy, and was not within any exception in the said condition.

From the judgment entered in conformity with this conclusion, the defendants appealed.

W. Tracy, for the appellants.—The condition set out in the policy was a warranty by the owner against a loss caused by the explosion.

It was found that the fire originated from, and was caused by the explosion of a steam-boiler. The effect of the policy was to insure against loss by fire, notwithstanding there was a steam-boiler, but not against a fire occasioned by the bursting of that boiler. (St. John *a.* American Mutual Fire & Marine Ins. Co., 1 *Duer*, 371; S. C., on appeal, 11 *N. Y.*, 516.)

In this case, as in the one at the bar, the policy was upon "machinery and fixtures," which included the steam engine which exploded.

In the case of Harper *a.* New York Ins. Co., 22, *N. Y.*, 441, where the injury was occasioned by carelessly igniting camphene, which the court held was covered by the policy, as one of the materials used in business, the opinion of Ch. Judge Comstock concedes that a policy can be so framed as to allow the presence of a dangerous article, and even to insure its value while the insurer is exempted from loss occasioned by its use.

In Hayward *a.* Liverpool and London Fire Ins. Co., 7 *Bosw*, 385. the precise point is decided by the Superior Court. The condition there was, "neither will this company be liable * * for loss or damage by explosion of any kind," (387.) The property insured was an India rubber factory, and it was found that "a steam engine was necessary and ordinarily used in the carrying on of an India rubber factory."

Luther R. Marsh, for the respondent.—I. Allowing the

printed clause to be valid, and of controlling effect, the case is within the privilege or license contained in the condition itself. The privilege is granted by the *written* portion of the policy, to use a steam-engine, and consequently the "explosive substance," steam, from which the fire originated. The fact of its being expressly *named* in the privilege, makes this a stronger case in favor of the plaintiff than those of Harper *a.* Albany Mut. Ins. Co., 17 *N. Y.*, 194, and Harper *a.* N. Y. City Ins. Co., 22 *N. Y.*, 441.

II. If the terms of the *written* and *printed* portions of a policy are inconsistent, the written portion will control, and the condition cannot exempt the company from liability. The steam-engine was insured as part of the "*stock in trade*" of plaintiff, and was necessarily employed in his business, which brings the case directly within the rule in Harper *a* The Albany Mut. Ins. Co., 17 *N. Y*, 194.

III. The risk in question was a specially hazardous one, and this printed condition does not apply to it.

By the Court: * Sutherland, J.—I cannot distinguish the question in this case from that in Harper *a.* The New York Insurance Company (22 *N. Y.*, 441).

That case was decided on the principle that, where, in a policy of insurance, there is a conflict, or repugnancy, between a provision of the printed formula, or conditions, and the written portion, the latter must prevail.

The reasoning of the prevailing opinion in that case, to show that there was this conflict, or repugnancy, in that case, applies with all its force to this case.

In the written portion of the policy describing the subjects of insurance, "steam-engine" is specifically mentioned.

In the case of Harper *a.* The New York Insurance Company, the provision of the printed conditions which raised the question was, that the company would not be liable for any loss, either by fire, or otherwise, occasioned by camphene. The provision of the printed conditions, which raises the question in this case is, that the company would not be liable "for any loss or damage caused by or consequent upon the bursting or

* Present—Leonard, P. J., Clerk and Sutherland, JJ.

collapsing of a steam-boiler, or steam-pipe." As the only purpose of the policy was to insure against loss by fire, this provision must, I think, be construed as meaning that the company would not be liable for any loss or damage by fire, caused by, &c. If so, it appears to me that the question in this case is identical with that in Harper's case. I think the judgment in this case should be affirmed, with costs, on the authority of that case. The case of Hayward *a.* The Liverpool and London Fire and Life Insurance Company (7 *Bosworth*, 385), must be considered as overruled by Harper's case.

ACKLEY *a.* TARBOX.

Supreme Court, Sixth District; General Term, May, 1865.

TAXATION OF COSTS.

The costs of an appeal to the Court of Appeals are to be taxed according to the law at the time of the decision of that court, or when the judgment of the Court of Appeals is made the judgment of the Supreme Court.

Appeal by plaintiffs from an order made at the Chenango Special Term, in February, 1865, by which a charge of $20, for "prepared case," was struck from the plaintiffs' bill of costs, which had been allowed by the clerk of Otsego County.

The action was commenced in a justice's court and by successive appeals taken to the Supreme Court, in which last-mentioned court the plaintiffs were beaten and judgment was rendered in favor of the defendants. After obtaining leave for that purpose, the plaintiffs appealed from the judgment of the Supreme Court to the Court of Appeals, in June, 1860. The case was argued in that court in June 1864, and at the next term of that court the judgment of the Supreme Court was reversed, and judgment given in favor of the plaintiff with costs; which judgment was, upon the filing of a remittitur, made the judgment of the Supreme Court.

The clerk of Otsego County adjusted the plaintiffs' costs, and

allowed the plaintiffs, as an item of costs in the Court of Appeals, a fee of $20 for a "prepared case."

This court, at the above-mentioned special term, disallowed that item, and made an order that the same be struck out, and that the unpaid portion thereof be refunded to the defendants.

The plaintiffs appealed from the order of the special term to the general term of this court.

James E. Dewey, for plaintiffs, appellants, cited the following authorities: Jackett *a.* Judd, 18 *How. Pr.*, 385; Torrey *a.* Hadley, 14 *Ib.*, 357; Fisher *a.* Hunter, 15 *Ib.*, 156; Jones *a.* Underwood, 18 *Ib.*, 532; Van Valkenburg *a.* Van Allen, 1 *Ib.*, 86; Thompson *a.* Crippen, 1 *Ib.*, 233 (note); Goodenow *a.* Livingston, 1 *Ib.*, 232; Holmes *a.* St. John, 4 *Ib.*, 66; 4 *Ib.*, 67; Huber *a.* Lockwood, 15 *Ib.*, 74; Hunt *a.* Middlebrook, 14 *Ib.*, 300; Moore *a.* Westervelt, 14 *Ib.*, 279; People *a.* Herkimer Com. Pleas, 4 *Wend.*, 210; Supervisors of Onondaga *a.* Briggs, 3 *Den.*, 173; Crary *a.* Norwood, 5 *Abbotts' Pr.*, 219; Steward *a.* Lamereux, 5 *Ib.*, 14.

L. L. Bundy, for the defendants, respondents, cited *Voorhies' Code*, 8th ed., 600; and Bennett *a.* Westfall, 15 *How. Pr.*, 431.

By the Court.*—Balcom, J.—The plaintiffs were the appellants in the Court of Appeals, and, according to the fifth rule of that court, it was their duty to make a case, consisting of a copy of the return of the clerk of the Supreme Court, and the reasons of such court for its judgment, or an affidavit that the same could not be procured; and if the case was voluminous, it was their duty to add an index to the same. Such a case was made and served by the plaintiffs' attorney in the Court of Appeals prior to the year 1864, when there was no law that gave the appellant in that court any separate or specific allowance or compensation for that labor. But at that time the appellant was allowed a compensation for such services, by the provision that gave him twenty-five dollars "on appeal to the Court of Appeals, *before argument.*" At the time the cause was decided

* Present, Parker, Mason, and Balcom, JJ.

by that court, the code had been so amended as to allow the appellant thirty dollars for services, before argument in such court, and also twenty dollars "for preparing and serving a case" in the appeal there. (*Laws* of 1864, pp. 996, 997; *Voorhies' Code*, 8th ed., § 307.)

The authorities cited by the plaintiffs' counsel show that it is competent for the Legislature, at any time during the progress of a suit, to create an allowance for services not before provided for, and to increase or diminish or wholly abolish such allowances as existed at the time the suit was commenced; also that the recovery of costs must be controlled, as to items and the rate of compensation, by the statutes in force at the time when the right to costs is established, or judgment therefor is pronounced. The plaintiffs, therefore, were entitled to costs in this case, according to the Code as it existed at the time the Court of Appeals reversed the judgment of the Supreme Court, and adjudged that they were entitled to a judgment in their favor with costs, or at least when the judgment of the Court of Appeals was made the judgment of the Supreme Court. The Code, at such times, allowed them twenty dollars "for preparing and serving a case" in the appeal to the Court of Appeals; and as that labor was actually performed by them, or their attorney, they were entitled to twenty dollars for such services.

It follows that the order of the special term, appealed from, should be reversed, and the adjustment of the plaintiffs' costs by the clerk affirmed.

Ordered accordingly.

CLAPP *a.* SCHUTT.

Supreme Court, First District; General Term, May, 1865.

Liability of Bail.

The sheriff has no cause of action against bail who have failed to justify, until he has sustained damage from his own liability as bail consequent on such failure.

Bail who have been excepted to by a party to an action, and have failed to justify, are not liable to such party on the undertaking.

Clapp *a.* Schutt.

It seems, that the sheriff may assign his rights against bail who have failed to justify, and that the assignee may recover thereon for damages actually accrued to the sheriff.

Appeal from a judgment on a demurrer.

The complaint showed that, on the 23d May, 1862, the plaintiffs commenced an action in this court against Smith M. Coope and Fisher, and on that day Mr. Justice Barnard granted an order for the arrest of the defendants Coope and Fisher, holding them to bail in the sum of $500; that, on the 18th day of June, 1862, the sheriff, under such order, arrested the defendant Coope; that, on the 10th day of July, 1862, Coope, with the defendants in this action, became bail to the sheriff, by which they "undertook that the said defendant Coope should, at all times, render himself amenable to the process of this court during the pending of the said action, and to such as might be issued to enforce the judgment therein;" that, on the 19th July, 1862, the plaintiff excepted to the bail, and the bail failed to justify; that, on the 6th of October, 1862, judgment was obtained in the action against Coope and Fisher for $518.74 damages and costs; that, on the 6th of November, 1862, an execution on the said judgment was issued to the sheriff of the city and county of New York against the defendants Coope and Fisher, and returned unsatisfied; that, on the 9th day of January, 1863, an execution on the judgment was issued against the body of the said Coope, which execution was, by the sheriff, returned not found; and that, on the 16th day of March, 1863, the sheriff, for a good consideration, assigned the undertaking on the arrest to the plaintiffs, who demand judgment against the sureties on the undertaking.

To this complaint the defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer came on trial at the October Term, 1863, before Mr. Justice Clerke, who gave judgment for defendants on the demurrer, from which judgment the plaintiffs appealed.

R. M. Harrington, for the appellants.—I. The allegation of the complaint is, that the defendants duly executed and delivered to the sheriff an undertaking, &c., in due form of law,

by which they undertake, &c. This undertaking is in strict compliance with section 187 of the Code. There seems to be no doubt of the right of a plaintiff in an action, who has taken an exception to bail given on the part of a defendant, to sue on the undertaking, although the bail fail to justify; and more especially where he proceeds (as in this case) with an assignment of the rights of the sheriff. But the Code has changed the character of the bail. The bail now taken answers to the bail below and bail above under the old system. The Code adopted the Massachusetts, Maine, and New Hampshire system of bail. (Note A of Tidd's Practice, 4th Am. ed., Vol. i., p. 248, and cases cited.)

"The bail thus given answers the purpose of bail below and bail above, at common law."

The undertaking has written in it the contract of the bail; there is no provision in it that it shall be void if excepted to by the plaintiffs. The contract is written out and subscribed by the party, and the courts cannot engraft upon it any new provisions.

Samuel Jones and *J. F. Malcolm*, for respondents.—I. The complaint alleges that the sheriff delivered to the plaintiffs a copy of the undertaking, taken upon the arrest of the defendants; that within the time allowed by law the plaintiffs served upon the sheriff a notice that they did not accept the bail taken upon the arrest, and that the bail did not justify. That discharged these defendants as bail in the action. (9 *Wend.*, 477.)

II. If the plaintiffs had served no notice upon the sheriff, or after service of notice the bail had justified, and there had been a breach of the conditions of the undertaking, their right of action would have been perfect without any transfer from the sheriff. The plaintiffs were the parties for whose benefit this undertaking was taken, but the necessary steps to invest them with the title thereto never happened. It was an inchoate right, subject to be made perfect upon their justification.

III. By the 201st section of the Code, upon a state of facts as presented by the complaint, the sheriff is declared liable as bail to the party aggrieved; and the same section says how the sheriff may discharge himself from such liability. He cannot discharge that liability to the plaintiffs, or his official duty to these defendants, by assigning the undertaking, and shifting it upon parties who cannot relieve themselves.

IV. The statute that charges the sheriff with liability as bail, also invests him with certain rights—that is, he can put in bail and surrender the principal: these defendants cannot do that. If the sheriff should surrender the principal, he would discharge himself of the debt, and he would be only liable for the costs of the action against himself as bail. (Buckman *v.* Carnley, 9 *How. Pr.*, 180.)

V. The sheriff had no assignable rights in this undertaking, he is not named as a party to it. If the bail justified and there was a breach of the conditions, it was then the property of the plaintiffs, and they had a right of action upon the instrument itself, without the intervention of the sheriff. The statute, in that case, does not give the sheriff the custody of the instrument.

VI. If the bail on the arrest fail to justify, the sheriff is bail, and the sheriff has no cause of action upon it as an undertaking in the action. His cause of action is given him by statute upon the fact that the bail did not justify, and they are only liable to him for the damages he may sustain by reason of their omission to justify. (*Code of Pro.*, § 203, 1 *Hill*, 59.)

VII. The sheriff can have no cause of action until he has been damnified.

VIII. By the 2d Revised Statutes, 3d edition, pages 441 and 443, section 11, the bond was to be given to the officer making the arrest, with the addition of his name of office; and by the 12th section, if default was made in the condition of the bond, it was to be assigned to the plaintiff, if he requested, by the sheriff. By the 19th section, the court would stay the proceedings against the sheriff until he had time to obtain judgment upon the bond taken upon the arrest; and by the former practice it was optional with the party whether he would take the assignment of the bond or prosecute the sheriff. The Code gives him no option. It has declared that, in a case as presented by this complaint, the sheriff is liable as bail. There is no provision in the Code that the sheriff may assign an undertaking, as was in the old statute about assigning bonds. (Sartor *v.* Merceques, 9 *How. Pr.*, 188; Metcalf *v.* Stryker, 10 *Abbotts' Pr.*, 12.

By the Court.—Ingraham, P. J.—I do not deem it necessary to decide in this case whether the sheriff may or may not

assign the right of action which he may have against the bail. I can see no reason why, after that right has become perfect, and he has a claim for damages on the undertaking, he may not assign that right to a third person. I think, however, other views of this case are decisive of the question raised on the demurrer.

The bail originally put in were excepted to, and did not justify. They did not therefore become responsible to the plaintiffs, and the sheriff became liable as bail in the action. (Section 201 of the Code.) From this liability he can be discharged by putting in other bail.

By the 203d section, the bail, in case they do not justify or other bail is not given, become liable to the sheriff, by action, for damages which he may sustain by reason of such omission. (Section 203.)

This section is intended to secure the sheriff against the consequences of a failure to justify, or to put in other bail. The liability he assumes is to be bail himself, and he has a right to recover from the original bail the damages which he sustains by reason of that liability.

It is apparent, therefore, that he has no action against the bail, until he has sustained damage from the liability as bail which the law imposes upon him. His right of action is not to recover for not putting in bail or surrendering the principal, but for damages which he may sustain by reason of such omission to justify, &c.; and until he has sustained such damage, he has no right of action against the bail. In this respect the liability of the bail is different from that under which the bail to the sheriff were liable under the old system. They were liable if they did not put in bail in the action. Under the present system, the liability is for the damages which the sheriff has sustained.

From what I have said, it is easy to define what the complaint should contain to make out a sufficient cause of action. It is not only the facts preliminary to giving the undertaking, the neglect to justify, or substitute other bail, and the recovery of judgment in the original action, with the execution and return; but, also, that the sheriff has sustained damage in the action, and a statement of what that damage was.

This would be necessary to enable the sheriff to recover in his

own name. It would be just as necessary if the plaintiff as assignee could maintain an action.

In this respect the complaint demurred to is defective. There is no averment of any damage, nor is it even averred that the sheriff has in any respect been damaged, and without that there is no cause of action stated.

The demurrer in this respect is well taken, and the judgment should be affirmed.

HOWARD *a.* FARLEY.

New York Superior Court; General Term, April, 1865.

INTEREST ON INTEREST.

Where, by the condition of a bond, the interest is payable at specified times before the principal sum becomes due, such interest, on a demand of it after it has accrued, becomes principal, and will bear interest from the time of such demand; or, if a demand is not proved, from the commencement of suit.

Appeal from a judgment.

The action was upon a bond conditioned to pay $3,800 on the 21st of May, 1865, with interest payable semi-annually, on the 21st days of November and May in each year. The plaintiff alleged the non-payment of the interest which became due and payable on the 21st day of May, 1863, and demanded judgment therefor, with interest thereon, from said 21st of May, 1863

The action was tried by a justice of this court without a jury The plaintiff requested the justice to find and decide that the plaintiff was entitled to judgment for the amount claimed, with interest thereon from the 21st of May, 1863. The justice refused so to decide, and the plaintiff excepted. The plaintiff further requested the justice to decide that the plaintiff was entitled to judgment for the amount claimed, with interest thereon from the commencement of the suit. The justice refused so to decide, and the plaintiff excepted.

The justice decided that the plaintiff was entitled to, and directed judgment for the plaintiff for, the amount claimed, without interest.

To this decision the plaintiff also excepted, and appealed from the judgment.

G. Tillotson, for the appellant, plaintiff.

M. L. Townsend, for the respondents, defendants.

By the Court.*—Monell, J.—In the action of debt on bond, as it existed before the adoption of the Code of Procedure, the judgment was for the penalty, but execution issued to collect only the amount actually due. Since the Code, however, as I had occasion recently to decide (Howard *a.* Farley, 18 *Abbotts' Pr.*, 254), the action must be for the recovery of the sum due, and not for the penalty.

In the case before us, the plaintiff sought to recover one year's interest upon a bond, the principal sum secured not being due until two years thereafter, and the only question is whether the plaintiff is entitled to recover interest upon the sum demanded in her complaint; and if so, whether from the time it became due, or from the commencement of the suit.

It is well settled, both in equity and at law, that compound interest is not recoverable without a special agreement to that effect. The parties, however, may agree that interest due may thereupon become principal and bear interest. (Van Benschoten *a.* Lawson, 6 *Johns Ch.*, 313.) At common law, interest was not recoverable in any case, either as an incident to the debt or otherwise. The rule has been greatly relaxed by statutes and adjudications, so that interest may now be recovered in all cases where the contract by its terms bears interest as an incident to the debt, or when it is allowed by way of damages.

On a contract to pay a given sum of money at a certain future day, with interest payable half-yearly, an action may be maintained to recover an instalment of interest although the principal is not due. (Howard *a.* Farley, *supra*; Herries *a.* Jamieson, 5 *T. R.*, 553.)

In the case before us, the interest was payable on the bond on the twenty-first days of November and May. The time of payment was fixed by the contract, and it became the right of the plaintiff on each of these days to demand its payment. If

* Present, Moncrief, Monell, and McCunn, JJ.

paid, it would have become principal in his hands capable of earning interest; and if not paid, it would be difficult, I think, to find a reason for withholding interest from the time of the demand. In all the cases in equity or at law, the question has arisen under a different state of facts. In those cases the interest when due was not demanded, and in suits to recover the principal debt interest was not allowed to be compounded. Hence, if the holder of a note or bond allowed the time to run by, without demanding interest, he could not afterwards, in an action on the note or bond, recover compound interest. (Connecticut *a.* Jackson, 1 *Johns Ch.*, 13; Van Benschoten *a.* Lawton, *supra.*)

In Lord Clancarty *a.* Latouche (1 *Ball & Beatty*, 430), Lord Chancellor Manners says: "It would be fair for the mortgagee to call for interest due at the end of the year; and if not paid, to insist on its becoming principal."

Courts of law, as well as of equity, have discountenanced and disapproved of provisions in contracts that interest shall become principal, and have invariably treated such contracts as usurious and void. But I have not been able to find any case which holds that the parties may not agree, after the interest becomes due, that it shall bear interest. The chancellor, in Toll *a.* Hiller (11 *Paige*, 231), held that such an agreement could be made and was valid.

In principle, there is no difference between the express and the implied agreement. Where a man agrees to pay the interest of a debt on a given fixed day, he ought to be held to the performance of his engagement; and in default should be liable in *damages*, for interest is always given as damages for the breach of the contract.

Lord Mansfield in an early case (Robinson *a.* Bland, 2 *Burr.*, 1077) said: "When money is made payable by an agreement between parties and a time given for the payment of it, this is a contract to pay the money at a given time, and to pay interest for it from the given day in case of failure of payment at that day. So that the action is, in effect, to obtain a specific performance of the contract. For pecuniary *damages*, as upon a contract for the payment of money, are from the nature of the thing a specific performance, and the relief is defective so far as all the money is not paid." This language of an eminent

jurist, although applied to the debt, equally applies to the interest, when the interest is payable at a fixed period. A specific performance of the contract to pay interest on a given day, would require the party to perform as of the day of failure, or to pay damages. Such damages would necessarily be the interest upon the interest defaulted.

In Pierce *a.* Rowe (1 *N. H.*, 179,) interest was allowed in an action to recover an instalment of interest upon a note. The court say, that from the time the interest became due the debtor was culpable for not paying it, and must be presumed to have employed it, as well as the principal, to his own use.

In Greenleaf *a.* Kellogg (2 *Mass.*, 568), a similar decision was made, and interest allowed. See also Hastings *a.* Wiswall (8 *Mass.*, 455.)

In Connecticut Mutual Life Ins. Co. *a.* Cleveland &c. R. R. Co. (41 *Barb.*, 9), the action was to recover on interest coupons annexed to the bonds of the defendants. These coupons contained each a promise to pay on a certain day thirty-five dollars *interest* due on that day; and the court allowed interest to be recovered upon the coupons from the day of the default. Although some stress is laid, in the opinion of the court, upon the fact that the coupons could be cut off, and were negotiable by delivery, yet the decision really rested upon the principle that interest should be allowed by the way of *damages for the delay of payment.* So that the analogy between that case and the one I am considering is striking.

I think the general rule ought to be applied to this case, that where, by a written contract, money is to be paid at a fixed day, and the contract is broken, interest should be allowed. Especially so where the creditor demands his due and the debtor refuses or neglects to pay. In such a case there can be no application of the rule as stated in Mowry *a.* Bishop (5 *Paige*, 98), "that it was a rule of public policy, to prevent an accumulation of compound interest in favor of negligent creditors, who do not call for the payment of their interest when due."

If the interest is demanded when due, it becomes principal from that time, and interest upon it should be recoverable. If these views are correct, the refusal of the learned justice to allow some interest was erroneous.

There is no evidence of a demand before suit. Therefore the recovery of interest can only be from the commencement of the action.

Unless the defendants consent in writing to allow the judgment to be amended, so as to include the interest from the commencement of the suit, the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. If the defendants consent to the amendment, then the judgment as amended will be affirmed, but without cost of the appeal to either party.

DYCKMAN *a.* VALIENTE.

Supreme Court, First District; Special Term, May, 1865.

APPEAL FROM ORDER GRANTING A NEW TRIAL.—STAY OF PROCEEDINGS.

The amount of security to be given on an appeal, by the defendant, from an order granting a new trial, is regulated by the *Code of Procedure;* and the court will not make an order staying proceedings on any other terms.*

The question whether a party has complied with the provisions of the Code in giving security to stay proceedings, can only arise upon a motion to set aside the proceedings of the opposite party taken subsequent to the giving of the security.

Motion to resettle an order.

The defendant, José Valiente, in the above action appealed to the Court of Appeals from an order of the general term reversing a decision of the court below and granting a new trial, and thereupon gave an undertaking, according to § 334 of the Code, in the sum of $250. The plaintiffs, claiming that this did not stay their proceedings, noticed a motion for leave to file a supplemental complaint, and the defendant thereupon moved the court at special term for a stay pending the appeal. The plaintiff opposed this motion, and insisted that if the court should grant a stay, it should do so only on the condition of the de-

* But compare McMahon *a.* Allen, 18 *Abbotts' Pr.*, 126.

fendant giving a bond to secure the amount claimed in the complaint, citing the case of McMahon *a.* Allen in 13 Abbotts' Pr., 126. The judge reserved his decision, and a few days afterwards denied the motion in the following terms: "Motion denied; if the defendants want a stay, they should give the security required by the Code."

The defendant thereupon entered up an order denying their motion, and embodying this memorandum of the judge.

The plaintiff moved to resettle the order by striking out the words "if the defendants want a stay, they should give the security required by the Code."

Henry A. Cram, for the plaintiff, insisted that the case was wholly unprovided for in the Code, and relied on McMahon *a.* Allen (13 *Abbotts' Pr.*, 126) as disposing of the whole case.

I. T. Williams, for the defendant, argued that as this case was not included in sections 335–338 of the Code, the case necessarily fell under section 342, and hence the court had no discretion or authority in the matter.

Barnard, J.—The order of 23d February, 1865, signed by me, must be amended by striking out the words "and that if the defendants want a stay, they must give the security required by the Code." This language was used in the decision of the motion merely for the purpose of showing the ground on which the motion was denied. I was of opinion, and am still, that the Code makes ample provision for the staying of proceedings in cases of this character. The Code having made such provision, a party desiring a stay must comply therewith. The court will not make an order staying proceedings on any different terms than those required by the Code, nor will it make an order directing proceedings to be stayed upon the giving of the security required by the Code. The giving of that security stays proceedings by force of the statute, without any interference of, or order from the court.

The question whether a party has complied with the provisions of the Code, can only arise upon a motion to set aside the proceedings of the opposite party taken subsequent to the giving of the security.

WELCH *a.* THE MAYOR, &c., OF NEW YORK.

New York Common Pleas; Special Term, June, 1865.

CONTINUATION OF MECHANICS' LIENS.

Where the holder of a mechanics' lien has in good faith commenced proceedings to enforce it, an order ought always to be granted to continue such lien, so that the lienor may not be prejudiced by the lapse of the year before the litigation can be terminated.

Such order may be made *ex parte* or upon notice.

A mechanic's lien ceases after one year, unless continued by order of the court.

Motion to vacate an order to continue a mechanic's lien.

This was a proceeding to foreclose a mechanic's lien effected upon Ward School Number Eight, in the city of New York, on the 14th day of June, 1864, to which The Mayor, &c., The Board of Education, and other parties having liens, were made parties.

A notice to appear at chambers on June 26, and submit to an accounting, was served upon these parties on the 12th and 13th June; and on June 14, on proof of service thereof, and an affidavit of the plaintiff's attorney that no notice of appearance or of claim had been served upon him, and that notice of commencement of suit had been given the county clerk, an *ex parte* order was obtained (on the 14th June, 1865, the day the lien would have expired), continuing the lien, and directing the county clerk to make a new docket stating the fact.

Chas. Whitlock, the holder of the lien immediately succeeding that of the plaintiff, who had instituted proceedings to foreclose his own lien, obtained an order to show cause why the order of continuance should not be vacated.

Geo. W. Wingate, for the motion.—I. The order is irregular on its face, and on the face of the affidavits on which it was granted.

Proceedings have been regularly instituted to foreclose the plaintiff's lien, and all persons made parties have been served with notice. These proceedings were not commenced until the 12th inst., within two days of a year from the day of filing; and the application itself was made on the very last day allowed by law.

No reason is shown excusing the plaintiff's laches, or affording any grounds for continuing the lien. These facts constitute the strongest possible argument against a continuance of the lien.

II. An order of this description is only granted as an exercise of the equitable power of the court, and the facts alleged show conclusively that the plaintiff is not entitled to any interposition of such power on his behalf.

The only object of the provision authorizing the continuance of a lien was to allow a lienor who had used due diligence, but had been unable to institute his proceedings within the year, such time as might be necessary for that purpose. (Freeman *a.* Cram, 3 *Const.*, 309.)

That decision was based on the old lien-law; and that now in force, and under which this proceeding is instituted, was intended to be even of a more summary character, so that a lienor, unless guilty of gross laches, would have no difficulty whatever in foreclosing his lien within the year.

III. Before any such order can be made, the lienor must set forth some reason why the court should interfere in his behalf.

Admitting that the whole matter is in the entire discretion of the court as to the validity of those reasons, they cannot exercise such discretion until they are furnished with something to form a foundation for its exercise. (Skinnion *a.* Kelley, 18 *N. Y.*, 355; Russell *a.* Conn, 20 *Ib.*, 81.)

It never was intended that every person commencing a proceeding to foreclose a lien should be entitled as of course to an order extending his lien indefinitely. (People *a.* Utica Ins. Co., 15 *Johns.*, 358, 380; Jackson *a.* Collins, 3 *Cow.*, 89; People *a.* Draper, 15 *N. Y.*, 352.)

IV. The fact of the plaintiff delaying till the very last moment before instituting proceedings to foreclose his lien, so far from affording a foundation for the exercise of any discretion by the court, is conclusive evidence of such laches on his part

as deprives him of any claim to have his lien extended. The fact that the moving papers show that he has regularly commenced proceedings, in itself shows that the reason for any extension of his lien is destroyed; it shows that there is no necessity for any such order to protect his rights.

Although the lien-law provides in general terms "that liens shall cease after one year" (*Laws of* 1863, 864, § 11), yet the section is to be read in connection with the preceding provisions, "that the lien shall only be satisfied on an order of the court, on due proof that one year has elapsed, and no action been commenced." (*Ib.*, § 10.)

If not so satisfied, it remains on the docket; and while there, is notice to all the world.

This is especially the case in the present instance, where notice has been served on the county clerk that the proceedings have been commenced.

The intention of the statute was clearly to follow the law of 1851, and allow liens to continue "until the determination of proceedings to foreclose them."

Even, therefore, if an affidavit had not been filed, the case would be within the reasoning of DALY, J., in Paine *a.* Bonny (6 *Abbotts' Pr.*, 99; S. C., 4 *E. D. Smith*, 734).

V. Admitting that the lien would not continue, the fault is entirely that of the plaintiff, who had it in his power to dispose of the whole matter within the year.

It will be recollected that he has no superior equity over any of the other lienors except what he may have obtained by superior diligence; and to maintain any such equity over them he must maintain the same diligence.

VI. The order is irregular, as it provides for an indefinite continuance of the lien.

(*a.*) The object of the lien-law is not to create a permanent encumbrance, but a temporary lien, and to make it the interest of all parties to determine the matter at the earliest possible moment, and in the most summary manner. (See cases, *supra.*)

The limitation contained in the act is a statute of repose.

Acts of this character are favored by public policy; and should be favorably construed. (Van Keuren *a.* Parmelee, 2 *Comst.*, 526.)

(*b.*) Such a continuance would result in removing all incentive to diligence on the part of the lienor, and the liens for all practical purposes will be perpetual,—a result directly opposed to public policy and the whole tenor of the lien-law.

(*c.*) The plaintiff having instituted proceedings, has no right under any circumstances to ask for a continuance for any longer than their determination.

This was all that was provided in the act of 1851.

VII. The order should not have been granted *ex parte.*

(*a.*) The order of continuance was really creating a new lien upon the premises for an indefinite period.

The other lienors were opposed to it.

The Mayor, &c., and the Board of Education were also opposed.

What right then has the plaintiff to an order of this description until the parties interested are afforded an opportunity of being heard?

"It is an elementary rule, that persons having an apparent right must be brought into court before the court will do any thing to affect that right." (1 *Vesey Jr.*, 29, 1789; Hallett *a.* Hallett, 2 *Paige*, 15; Isnard *a.* Cazeaux, 1 *Ib.*, 39.)

This also being "an application for an order," was a motion. (*Code*, § 401.)

And Rule 29 of Supreme Court provides that "all motions shall be brought before the court on notice of eight days, or by an order to show cause."

(*b.*) The affidavit "that no one had appeared," shows that the court supposed that there was no one to give notice to, and did not know that the time for the parties to appear had not arrived.

VIII. This being one of the cases where a number of liens (amounting to $3,088) have been filed upon the balance due from the Board of Education to the contractor ($400), it results, that as each lienor has the same right to an *ex-parte* order of continuance as the plaintiff, that the building will remain covered with liens for an indefinite period.

Welch may find his proceedings are wrong, and discontinue, and commence again indefinitely.

If the principle is established, it is easy to see the great hardship that would result to private owners of real estate.

Before, therefore, any such order could be made, all parties interested should have been notified, and afforded an opportunity of opposing, and the want of such notice makes the order void.

Francis Tillou, opposed.

CARDOZO, J.—Although the lien is to be discharged of record only in the manner stated in section 10, yet by section 11 it absolutely ceases after one year, unless continued by order of the court. The fact that suit has been commenced will not keep the lien alive after the expiration of one year, but can only be effected by an order pursuant to section 11. I think it not going too far to hold that when the lienor has in good faith commenced proceedings to enforce his lien, an order ought, unless under very special circumstances, always to be made to continue the lien, so that he may not be prejudiced by the lapse of the year before the limitation can be terminated. Whether the order to continue be granted *ex parte* or upon notice is not important. If the order to continue be inadvertently granted, the party prejudiced can move for relief.

I do not see any reason why the order to continue should not have been granted, and the motion to vacate it must therefore be denied; but as the statute is very obscure and the motion is made in good faith, I shall not give costs.

Motion denied, without costs.

PEOPLE *on rel.* SMITH *a.* RUSSEL.

Supreme Court, First District; Special Term, June, 1865.

JURISDICTION OF CITY JUDGE IN SUMMARY PROCEEDINGS.—OFFICE OF THE WRIT OF PROHIBITION.

The city judge of the city of New York has jurisdiction of summary proceedings to dispossess a tenant from premises in that city.

People *on rel.* Smith *a.* Russel.

The power to hear and decide proceedings for the summary dispossession of tenants is a judicial power, and as such included in the powers of the recorder conferred upon the city judge of New York by the act creating that office; and the power to issue summons and warrant in such cases is incident thereto.

It is not within the office of the writ of prohibition to correct irregularities in judicial proceedings, but only to restrain the courts from exceeding their jurisdiction; it should not be issued where there is another and easier remedy.

A writ of prohibition, when allowed by a justice out of court, may be quashed on motion at special term, even if returnable at the general term.

Motion to quash a writ of prohibition.

The facts are fully stated in the judge's opinion.

By the Court.—Ingraham, P. J.—Summary proceedings were commenced before the city judge to remove from certain premises in this city the tenant, or those claiming to hold the premises. An answer was put in by the relator and others, and the case was adjourned by the city judge to the 30th May for trial. Before that day an application was made to one of the justices of this court for a writ of prohibition, which was granted, restraining Judge Russell from entertaining the said proceedings. A motion is now made to vacate and set aside the writ.

The only ground on which a writ of prohibition issues, is to prevent a court or magistrate from going beyond its jurisdiction in the exercise of judicial power (7 *Wend.*, 518), and it ought not to issue where the party has a remedy in some other form. (2 *Hill*, 367; People *on rel.* Brownson *a.* Marine Court, 14 *Abbotts' Pr.*, 270.)

The only inquiry therefore on this motion is, whether the city judge has jurisdiction of summary proceedings to dispossess a tenant from premises in the city of New York.

The powers of the city judge in matters other than the jurisdiction of the sessions, was in part examined in Matter of Nash (25 *How. Pr.*, 307.) In that case the authority of that officer to issue the writ of *habeas corpus* was under discussion, and the general term of this district held that the city judge had no authority to allow the writ. Relying upon that decision, the relator now claims that the city judge has no authority to entertain summary proceedings to dispossess tenants, and therefore that this writ of prohibition should be continued.

The decision of the general term in that case, of course, controls me to the extent it goes, whatever may be my individual views of the question, and I shall therefore only consider whether that decision is applicable to the proceedings which were stayed by the writ issued in this case.

The act of 1850 creating the office of city judge confers upon him all judicial powers vested by law in the recorder of the city of New York, and empowers him concurrently with the recorder to perform and discharge all judicial duties imposed on the recorder. The statute in regard to summary proceedings (2 *Rev. Stat.*, 51, *m*) confers on the recorder express authority to hear and decide in such proceedings, and I am at a loss to see upon what grounds it can be said that hearing and deciding upon such cases is not a judicial duty. The judge must hear the allegations and proofs, and if required, must summon a jury and try the matter in difference; and if the verdict is rendered for the landlord, he is to issue a warrant accordingly. The issuing of the summons or the issuing of the warrant are not by themselves judicial acts any more than allowing a writ of *habeas corpus*, but they are incidents necessary to enable the judge to discharge his judicial duty imposed. He could never be required to decide between the parties if he could not summon them before him. The true question is not whether issuing the summons is a judicial act, but whether the whole proceeding is a judicial proceeding involving the discharge of judicial duties. Of this there can be no doubt. The act of deciding between the parties is purely judicial, and all the other proceedings, of summons before and of warrant afterwards, are mere incidents for the purpose of enabling him to discharge that duty. It appears to me so plain as hardly to admit of any argument to sustain it.

In the Matter of Nash, before referred to, the decision appears to have been based upon the opinion expressed by Chief-Justice Kent, in Yates *a.* Lansing (5 *Johns. R.*, 282), that the allowance of a writ of *habeas corpus* in vacation was not a judicial but a ministerial act, because it was the duty of the magistrate in all cases to allow the writ.

The penalty sought to be recovered in that action, the Chief-Justice says, was imposed upon individuals acting ministerially or extra-judicially out of court. But that case can hardly be

said to be an authority for the doctrine that a judge in proceedings upon *habeas corpus* does not act judicially even when such proceedings are before him while he is not holding a court.

While I yield to that decision of the general term of this district in regard to the writ of *habeas corpus*, I see no reason for applying the rule adopted there to summary proceedings for lands. I think the duty exercised in regard to them is purely judicial, and may rightfully be exercised by the city judge.

The objection therefore to his want of jurisdiction is unavailing.

Something was said on the argument to the effect that the relator was not tenant of the persons claiming to be landlords, and therefore the proceeding could not be maintained. That is a matter of defence upon the trial. It is not within the office of the writ of prohibition to correct irregularities in judicial proceedings where there is no want of jurisdiction. They must be corrected on review of those proceedings by appeal or certiorari. This was so held by the general term of this district in People *on rel.* Brownson *a.* The Marine Court (14 *Abbotts' Pr.*, 270,) and the writ of prohibition should not issue where there is another and an easier remedy. Certainly the writ should not issue before the error has been committed, on the mere supposition that the judge would decide erroneously on the question whether the party was a tenant or not.

An objection was taken, on the hearing of this motion, that it should have been made at the general term. This is not so. The writ was allowed by the justice out of court, and even if returnable at a general term, may be quashed at a special term on motion. This was so held in a late case at the last term. Besides, the writ in this case is not returnable at a general term. It requires the party to show cause at the next term of the court, before one of the justices, on the third Monday of September next. This would be at a special term.

I think there is no ground on which this writ can be sustained.

The motion to set aside and vacate the writ must be granted.

TURFLER'S CASE.

Supreme Court, First District; General Term, May, 1865.

ASSESSMENTS FOR PAVING STREETS IN THE CITY OF NEW YORK. —DUTIES OF ASSESSORS.

The Common Council of the city of New York have the right to assume a portion of the expense of paving any street in the city, and pay the same out of the city treasury, at least when the paving is of a character to benefit the public rather than the holders of adjacent property.

Where an assessment is illegally made, in not complying with the ordinance directing it, a subsequent confirmation of the assessment by the Common Council will not cure the defect.

Where an assessment is directed to be made upon adjacent property for the paving, &c., of streets, the city should be charged by the assessors with a proportionate assessment for adjacent public squares, in the same manner as individual owners for their property.

The duties of assessors are confined to the execution of the ordinance directing the assessment; they cannot alter or amend it because it may seem to them illegal.

Where an ordinance directed a portion of the expense of paving a street to be borne by the city, and an equal portion to be assessed on the adjacent property, and a sum was first charged by the assessors to the city for adjacent parks, and the remainder divided between the city and the adjacent property,—*Held*, erroneous. The whole amount should have been divided between the city and the adjacent owners, and the city assessed among the latter as the owner of the parks.

Appeal from an order declaring an assessment void for irregularity.

In October, 1858, the corporation passed a resolution for paving Eighth Avenue, from Hudson-street to Forty-second-street, with Belgian pavement.

At the same time an ordinance was adopted directing the work to be done, that the Eighth Avenue Railroad Company pay one-third of the expense thereof, the property owners one-third of the expense, and the city treasury the remainder.

The same ordinance directed the assessors to make a just and equitable assessment of the expense of conforming to the pro-

visions of the ordinance among the owners, &c., of the lots intended to be benefited thereby.

Proposals were received, and the work awarded, in July, 1859, to Thomas K. Downing.

In September, 1859, the Common Council adopted an ordinance granting to the railroad company authority to pave all the space within the outside rails of their tracks with cobblestones, &c.

On December 30th, 1859, the Common Council confirmed the contract to Downing, with a modification excluding that portion within the outside rails of the Eighth Avenue Railroad Company.

The contract was completed by Downing, and the assessors made the assessment by charging the city with $54,846.89, the owners of lots with $54,846.89, and also charging the city with $12,130.81 for the public squares.

The petitioner, George C. Turfler, objected to this assessment that it was void on account of the irregularity of assessing an amount upon the owners of lots different from that directed by the ordinance. The justice at special term declared the assessment void, and the Common Council appealed.

William C. Trull, for appellants.

C. C. Langdell, for respondent.

By the Court—Ingraham, P. J.—It is very clear that in no view of the case can this assessment be said to have been made in compliance with the ordinance. The cost of the work done was $121,824.59. If the literal reading of the ordinance had been followed, the amount to be assessed on the owners was one-third, or $40,608.20, while the amount actually assessed was $54,846.89.

If the work set apart to the railroad company to be done by them could be considered as one-third part of the work, which is not alleged and of which there is no proof, but which seems to be the rule which governed the assessors, still a greater error has been committed in making an assessment on the city for the public parks, and then dividing the balance between the city and the owners. The direction was to assess an equal

amount on the treasury and on the owners. This would only be satisfied by charging half the amount to the treasury, and assessing the other half upon the owners, including the owners of the public parks. For the purposes of such an assessment, the corporation of the city of New York are owners of the public squares just as much as an individual owns a lot, and are to be assessed in the same manner. Under such a distribution, the amount to be charged to the treasury of the city would have been $60,917.29, and to the owners, including the parks and squares, $60,917.29; and deducting from this sum the amount charged to the public squares, would leave the owners of other lots liable to assessment in the sum of $47,786.48, instead of $54,846.89, which was imposed by the assessors. So that whatever construction is given to this ordinance, it is very clear that it has not been followed by the assessors.

It is equally clear that the error which was committed comes within the term legal irregularity. The ordinance directed the work to be done, and the expense assessed in a particular manner, and the assessors have made the assessment in violation of the ordinance. For this they had no warrant, and the assessment would be illegal.

This leaves us to the decision of the main question in the case, and which is one of great importance to the city as well as to the owners of property; and that is, whether the Common Council has power to assume a portion of the expense of paving the streets, and pay therefor out of the treasury; and whether the assessors have a right to disregard such act of the city authorities, and charge the whole cost on the owners, notwithstanding the direction in the ordinance to the contrary.

The validity of any agreement with the railroad companies to pave between their tracks is also incidentally to be considered in disposing of this question.

The authority over the streets, and the regulating and repairing of them, was originally conferred upon the Common Council by the old charters of the city. They were authorized to lay out, alter, amend, and repair all the streets and highways then or thereafter to be laid out in the city of New York, in such manner as they should judge to be necessary or convenient.

This necessarily involved the right to pay for the same out of

the treasury. No special authority to assess the expense on the owners was given; and if not, it must of course be paid for out of the treasury. This provision of the charter still remains in force.

On the revision of the laws relating to the city, in 1813, provision was made for assessing the expense of improvements of streets in a more enlarged form than had been previously enacted in the statutes of 1787 and 1801.

The 175th section (2 Rev. Stat., 407) provides, that it shall be lawful for the mayor, &c., to direct the pitching and paving the streets thereof, and cause estimates of the expense of conforming to such regulations to be made, and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion to the advantage which each may be deemed to acquire. It then authorizes the Common Council to appoint assessors to make such estimate and assessment.

It is apparent, from the wording of this and the subsequent section, that it was intended that the estimate and assessment were both to be made before the work was done, as the 176th section provides for making a second assessment if it shall afterwards appear that a greater amount has been expended in doing the work than the sum then estimated and collected. (Doughty *a.* Hope, 3 *Den.*, 249.)

The act of 1859, section 15, changes the mode of appointing these assessors, but does not give them additional powers. They are charged with the duty of making estimates and assessments required by law for all improvements directed by corporation ordinance, for which an assessment may be made.

There is nothing in these provisions inconsistent with the powers conferred by the ancient charters of the city, but they are in addition thereto. The act of 1813 confers on the city, as did the previous acts of 1787 and 1801, the right to assess the expense of payments upon the owners or occupants of houses and lots benefited; but it in no way deprives them of the previous powers conferred on the city. Nor is that of 1813 obligatory, it is only permissive. It makes it lawful to assess, but it does not require them in all cases to do so.

Again, the act of 1813 authorizes the Common Council to make the assessment just and equitable among the owners

benefited, in proportion to the advantage required; and the distribution of the expense by the assessors has no validity until ratified by the Common Council. The power to review and ratify the assessment necessarily implies the power to correct.

The 15th section of the act of 1859 (*Valentine's Laws of N. Y.*, 1280) confines the powers of the assessors to improvements directed to be done by corporation ordinances. Unless the work is directed by an ordinance, they have no power to act. They must look to the ordinance for their authority.

In order to ascertain what was directed to be done, we must take the ordinance of October, 1858, and of September, 1859, together, as forming one, and that would direct the pavement of the Eighth Avenue, excepting the portion between the outer rails of the railroad; and it directs the assessment of one-third on the owners, one-third on the treasury, and one-third on the railroad.

It is evident such was not the intent of the parties. The first ordinance directed one-third of the whole expense to be so assessed, including the expense of paving between the rails; and it was no doubt the intent of the Common Council to allow the railroad company to assume the payment of the expense of repairing between the rails, as an equivalent for a third of the expenses which they were obliged to pay. If the ordinance had so stated, there would have been no difficulty in deciding this case. And even without it, if the assessment had been made by following such intent, and imposing one-half of the amount to be paid upon the city, and the other half upon the owners, the assessment might, perhaps, be upheld on this ground. But, as I have before stated, a larger amount has been so assessed, one which under no view of the case can be considered one-third of the expense.

It seems to me that the Common Council has an undoubted right to assume the pavement of any street in the city, and pay the same out of the treasury. Suppose some special mode of pavement is desired for public purposes, which in no sense can be beneficial to private owners, may not the Common Council order the same done, and pay the whole or any part of the expense out of the treasury? This is the case with all the avenues. A different and more expensive mode of pavement is required for public travel than is required for private use.

It is not just nor equitable to assess upon the owners of property the whole expense, which is no benefit to them, but which is of great convenience to the public; and when the public authorities assume a part of the burden, so as to leave the owners liable to their fair proportion of the expense according to the benefit received by them, I think no provision of law is violated.

So, also, in cases in which the railroad company, for the privilege of the grant which the company has received, assumes the obligation of paying the expense of paving between the rails, I can see no propriety in charging upon the owners the expense of paving that part of the avenue; and especially when, by reason of the grant for the purpose of a railway, the expense of paving is thereby increased.

A contrary system has for a long series of years been adopted in this city. In 1824, an ordnance was passed by the Common Council assuming the pavement of streets after they had once been paid for by the owners subsequent to that date. And at various times, when the grading of avenues was attended with so much expense as to work great injustice to the owners if the whole cost had been charged upon them, the Common Council assumed the payment of a part of such grading as a benefit to the public.

It appears to me that the 175th section of the Act of 1813 does not prevent such a course on their part. While that act gives them the power to assess the whole expense on the owners of lots, yet if for any reason they think the public should bear a portion of the expense, they have authority so to do, and that the section referred to is not obligatory.

It is urged on behalf of the appellants that although, the assessment may have been illegal, as made by the assessors, yet the confirmation of it by the Common Council was a ratification of it by competent authority, and thereby cured the irregularity. This is not so. The assessment in the first instance was illegal, because not made in conformity to the ordinance of the Common Council. A confirmation of it could not cure the illegality. This was held in Doughty *v.* Hope (3 *Den.*, 594), and it is unnecessary to add any thing on that subject.

It is also urged by the appellants, that the Common Council had no authority to impose the one-third of the expense on the

railroad company, and therefore the assessors were not bound to obey it. Whether they had such authority is a question between them and the railroad company, with which the assessors had no right to interfere. Their duty was discharged when they followed the directions of the ordinance. They are not, in the discharge of their duties, to decide whether the provisions of an ordinance are in all things in conformity to law, and if not, to amend it. They have no such authority. It is their duty to make the assessment as provided for in the ordinance. If the Common Council has erred, some other means of correcting their errors must be resorted to than an appeal to the judgment of the assessors. If no such authority exists, then the railroad company will dispute the payment; and if successful, the corporation must provide other means for the payment of the contractor.

Other questions have been raised as to the legality of the confirmation, which I do not deem it necessary now to examine.

Having arrived at the conclusion that the assessors are not independent, in their action, of the provisions contained in the ordinance directing the assessment, and that the Common Council have authority either in whole or in part to pay the expense of paving an avenue or street out of the treasury, and to assess the balance on the owners, it follows that the assessment made in this case was illegal, and that the order vacating it was right, and should be affirmed.

WELLES, J., and CLERKE, J., concurred.

PERKINS *a.* TAYLOR.

New York Superior Court; Special Term, July, 1868.

CONTEMPT.—RECEIVER'S NEGLECT TO PAY REFEREE'S FEES.

Where an order requiring a receiver to pay the fees of a referee who had passed upon his accounts, by its terms appeared to have been made without notice to the receiver, and by a different justice from the one before whom the motion was first heard, and did not recite regular adjournments,—*Held*, that the court would not enforce compliance with it by process for contempt.

Perkins *a.* Taylor.

It seems, that a referee is not entitled to process for contempt, to compel a party who is appointed receiver to pay his fees.

This was a motion by one of the defendants (Taylor) to compel the plaintiff, who had been appointed in this action receiver of the partnership effects of a firm, whereof the parties to this action were members, as such receiver to pay the fees of a referee for taking an account therein under an order of the court.

The action was brought by John Perkins against Joseph W. Taylor and others.

The firm of the parties was known as Taylor, Perkins & Co., and this action was brought to wind up its affairs. The order of reference in the cause required the referee to try all the issues in the action, to take the accounts of such partners as between each other, and of the plaintiff as receiver.

The firm already mentioned sold out the whole of its stock in trade to a new firm, consisting of the plaintiff, the defendant Taylor, and a third person (Helmer), at an appraised value. By an order entered in this action by consent, such appraised value was to be charged against that new firm as a debt. A third firm (Perkins, Helmer & Co.), differing in its composition from the others, being indebted to such second firm in a large amount ($8,560), delivered its notes to the latter therefor, which came into the hands of the plaintiff, but were never paid, and the makers became insolvent, so that nothing could be collected thereon.

The referee, in the proceedings before him, confined himself to taking an account of the assets for which the plaintiff would be liable to account as receiver, which he decided was to be made up and stated entirely separate from any partnership accounts. He excluded from such account any sums collected by the defendant Taylor; also all sums paid by the plaintiff to him, or due to the plaintiff for his share of the assets of the firm. He charged the plaintiff in such account as receiver with the before-mentioned appraised value of the stock in trade bought by the second firm; and also with the amount of the notes of Perkins, Helmer & Co., before mentioned, and various other sums. He did not report upon the issues in the action, or take or state any account as between the parties to

it; but made a separate report, to the effect that all the debts were paid, and that the plaintiff as receiver was chargeable with a large sum of money. Without allowing the charges against the plaintiff, so allowed in such report, nothing would have been due to the defendant Taylor from him.

The defendant Taylor, who made the present motion, had collected various sums of money due to such second firm, of which he was a member; and various motions, made by him in this action, to remove the plaintiff as receiver therein, upon the ground of his having failed to collect the sum due from such second firm to the earlier firm of Taylor, Perkins & Co., were denied.

By the order requiring the plaintiff to pay such referee's fees, it appeared to have been made upon the motion of the defendant Taylor alone, without any notice given to the attorneys of the plaintiff and the other defendant (Gelvoy). But it was claimed to be proved by other affidavits that such service had been made. The order was made by a different justice of this court from the one before whom the argument of the motion was commenced, and by whom the further hearing was postponed to enable the counsel for the defendant Taylor to produce authorities on his behalf.

The present motion was made upon affidavits annexed of a service of the order in question, and a demand of the referee's fees, and upon the papers upon which such order was made, on which are indorsed various stipulations to adjourn, not authenticated or alluded to in the order. The plaintiff's neglect to comply with such order arose wholly from his inability to pay such fees, being insolvent. The sureties in the bond given by him as receiver were of sufficient ability to pay them.

William Fullerton, for the motion.

John E. Burrill, for plaintiff and receiver, opposed.

ROBERTSON, J.—It does not appear that the referee is a party to the present motion; if he were, it could hardly be maintained that he could apply for process of contempt against the plaintiff to compel him to pay his fees. His protection lay in re-

fusing a reference, if the parties or their attorneys were not able to pay them, or in enforcing payment by action if they were. It is also very doubtful how far he has a right to split up an order of reference to him into several subjects, and report separately upon each, without an express direction to that effect contained therein, so as upon one branch of it to bring one party in debt and enable the other party to proceed against him for the costs of the reference.

The general rule is that the prevailing party upon a reference must pay the referee's fees, and recover it back from the other by proper proceedings, and that no process as for a contempt shall issue, where an execution can be used to enforce the payment of money. This, therefore, is an attempt to subject the plaintiff to imprisonment as an officer of the court for moneys for which he is only liable as a private individual.

If, however, such order has been originally obtained on due notice, although the matters now suggested on behalf of the plaintiff might have formed good grounds for resisting it—such as the want of enough money in his hands as receiver due to the defendant Taylor to pay such referee's fees—yet the propriety of making it cannot now be inquired into. *Prima facie*, the affidavits on which the order was granted showed he had a large sum for which he was accountable, which was not contradicted. Nor is it very clear how far I can go behind that order, without a motion to vacate it for irregularity, to ascertain if it was made on due notice of motion, and proper adjournments.

An order purporting to have been made without hearing the party to be affected thereby, or some proof of an opportunity having been afforded for the purpose, does not show on its face jurisdiction over such party as an officer of the court, so as to found proceedings thereon for a contempt in disobeying it; and the moving papers in this case do not supply the defect. If regular adjournments were necessary to enable one justice to decide a motion argued before another, and postponed for further hearing (in case he could do so at all), the supposed stipulations to adjourn, and even admissions of service, are not authenticated by any proof, and can hardly be adjudged to be so now by mere inspection.

If the original order had recited the fact of such adjourn-

ments and service of notice, this court would not on this motion be entitled to go behind it. As it is, I think there is a failure of proof of jurisdiction to sustain the order, which is not a proceeding in the action, but a collateral one against a receiver or officer of the court merely; although he happens to be the plaintiff, and the defendant is interested in enforcing it.

The defendant, who now moves, stands in no better condition than the referee to whom the money is directed to be paid, and derives no additional right from the fact of being a defendant. Process for contempt ought not to issue for non-compliance with an order so loosely obtained, against all the equities of the party sought to be charged, upon proceedings out of the ordinary course, in order to subject a party thereto, instead of to a mere execution.

The plaintiff also utterly denies his ability to perform the order, which is a sufficient excuse for its non-performance. (Meyers *a.* Trimble, 3 *E. D. Smith*, 607; S. C., 1 *Abbotts' Pr.*, 220, 399.)

It would be hard and oppressive to imprison him for a neglect which he could not avoid.

The motion must therefore be denied without costs, without prejudice to its renewal on the acquisition by the plaintiff of sufficient means to perform the order, or to any application to set the same aside.

PRATT *a.* CHASE.

Supreme Court, First District; General Term, Feb., 1865.

Insolvent's Discharge.*

Objections to defects in the proceedings for an insolvent's discharge of a merely formal nature must be taken by certiorari, and cannot be taken in a collateral action.

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* In another action involving the same questions, Soule *a.* Chase (*New York Superior Court; General Term, November*, 1863), the following points were decided: 1st. In proceedings for the discharge of an insolvent from his debts, under

Pratt *a.* Chase.

An affidavit by a petitioning creditor that a sum of money, "being the sum annexed to his name subscribed to the petition, is justly due to him from the said insolvent for goods, wares, and merchandise sold and delivered, secured by indorsement of M.'s note,"—*Held*, sufficient to support an insolvent's discharge.

An insolvent's discharge which stated "that the said insolvent has conformed in all things to those matters required of him by the statute," —*Held*, sufficient in form without setting forth that the due proof was furnished of the

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2 Rev. Stat., 35, the omission of a petitioning creditor to relinquish a security held by him does not affect the jurisdiction of the officer, nor avoid the discharge, even though his petition disclosed the existence of such security.

2d. Nor is the proof of publication of notice of the order to creditors to show cause essential to give jurisdiction. A discharge which recites due publication, and that due proof thereof was presented, is not invalidated by defects in the notice, its publication, or the proof thereof on file.

3d. The statute does not require publication for a certain length of time, but ten publications, each within so many successive weeks, the commencement of which is determined by the first publication.

4th. Proof that a notice was "published in the New York Day Book" is sufficient to show compliance with an order that it be published in "the newspaper printed in the city of New York, entitled 'The Evening Day Book,'" in the absence of any evidence of the existence of two papers with the title of Day Book.

5th. An affidavit, in the commencement of which the defendant is designated by name, is not void for not being subscribed by him.

6th. The published notice of an order to creditors to show cause, stating that the proceeding is for the discharge of an insolvent from his debts, need not specify the particular statute under which it is had; and adding a defective reference to the statute does not vitiate.

7th. The proof of publication of such notice is not limited by the statute to an affidavit of the printer, or the clerk or foreman of the printer, although it enables the insolvent to perpetuate the evidence by taking their affidavit.

8th. The petition and schedules need not state the grounds of the demands of creditors with such particularity as is required in a statement for judgment by confession; and *it seems* that want of sufficient particularity does not affect the jurisdiction of the officer.

9th. Where a discharge recites all the required jurisdictional facts and proceedings, the county clerk's certificate that certain papers, technically insufficient to show jurisdiction, are all that have been filed with him in the proceeding, is not, of itself, sufficient to disprove the recitals.

10. Whether a name in the list of creditors, variant from that of the plaintiffs' was intended to designate them; or whether their names were omitted, and if so, whether the omission was fraudulent;—*Held*, in this case, properly submitted to the jury.

11th. An insolvent's discharge granted under the laws of this State, is a good defence to an action on a judgment recovered here, in the absence of any evidence as to where the contract was made on which the judgment was recovered. Evidence that the creditor was a non-resident is not material.

notice having been given personally or by mail, twenty or forty days before the day of showing cause, &c.

The discharge of an insolvent under the insolvent laws of his own State is a bar to an action in the courts of such State by a citizen of another State, upon a contract made or to be executed in the State wherein such discharge was granted after the law was enacted.

Appeal from a judgment.

The plaintiffs, Dundas T. Pratt and Benjamin Reath, of Philadelphia, brought an action against the defendant, Thomas B. Chase, upon three promissory notes, two of them dated at Philadelphia in 1854, and the third dated at Buffalo, 1855, all payable in Buffalo.

The complaint set out the residence of the plaintiffs in Philadelphia, and of the defendants in the State of New York. The answer admitted these facts, but set up a discharge under the insolvent laws of the State of New York.

On the trial the defendant put in evidence the insolvent's discharge, of which the body was as follows:

"Whereas, Thomas B. Chase, of the city of Brooklyn, an insolvent debtor, residing in the said city, did, in conjunction with so many of his creditors, residing within the United States, as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him to creditors residing within the United States, present a petition to me, praying that the estate of the said insolvent might be assigned for the benefit of his creditors, and he be discharged from his debts, pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts; whereupon I ordered notice to be given to all the creditors of the said insolvent to show cause, if any they had, before me, at a certain time and place, why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts, proof of the publication whereof hath been duly made. And whereas, it satisfactorily appears to me that the doings on the part of the creditors are just and fair, and that the said insolvent has conformed in all things to those matters required of him by the said statute, I directed an assignment to be made by the said insolvent of all his estate, real and personal, both in law and equity, in possession, rever-

sion, or remainder, to William L. Van Deryee, assignee nominated by the creditors to receive the same; and the said insolvent having, on the seventh day of November, 1859, made such assignment, and produced to me a certificate thereof executed by the said assignee, and duly proved, and also a certificate of the clerk of this county, that such assignment is duly recorded in his office: Now, THEREFORE, KNOW YE, That by virtue of the power and authority in me vested, I do hereby discharge the said insolvent from all his debts and from imprisonment, pursuant to the provisions of the said statute."

The plaintiffs objected to the giving of the discharge in evidence on the grounds stated below; their objections were overruled. The plaintiffs then put in evidence the proceedings upon which the discharge was granted, to show that they were defective and irregular.

Especial exception was taken to the following matters, viz.: That the affidavit of the foreman of the State paper was not signed by him, and that the affidavits of the petitioning creditors were not sufficient.

The affidavits of four of the petitioning creditors were substantially as follows: that of the fifth added, after the word "delivered," "and various stocks."

A. B., one of the petitioning creditors of Thomas B. Chase, an insolvent debtor, being duly sworn, doth depose and say, that the sum of, &c., lawful money of the United States, being the sum annexed to the name of this deponent subscribed to the petition, is justly due to him from the said insolvent, for goods, wares, and merchandise sold and delivered, secured by indorsement of C. W. Smith's note, dated September 14, 1858, and payable months after date; and that neither he, nor any person to his use, hath received from the said insolvent, or any other person, payment of any demand, or any part thereof, in money, or in any way whatever, or any gift or reward whatsoever, upon any express or implied trust or confidence that he should become a petitioner for the said insolvent.

The plaintiff's counsel specified the following objections to the proceedings, which he contended rendered the discharge invalid and void:

The defendant's discharge under the two-thirds act is void for the following reasons, namely:

1st.—I. What purports to be the affidavit of the publication in the State paper is not an affidavit, because it is not signed by the deponent; the oath is not binding, as no perjury could be charged upon such a paper; consequently there is no proof of such publication. By every definition of an affidavit, it must be signed. (2 *Sandf.*, 648, and cases cited; 16 *Barb.*, 319; 2 *Kern.*, 375; 2 *Abbotts' Pr.*, 175; 14 *Ib.*, 45; *Whitaker's Pr.*, vol. 1, p. 166, and the cases there cited; 2 *Rev. Stat.*, ch. 17, art. 3, § 178.)

II. By the affidavit of G. C. Stimson, of the publication in the New York Day Book, "the first publication was May 28, 1859," which leaves only 63 days between the first publication and July 30, 1859, the day the affidavit was made, which gave the judge no jurisdiction to grant the discharge. (Small *a.* Wheaton, 2 *Abbotts' Pr.*, 175, and particularly noticed at bottom of page 179; Demarest *a.* Gray, 10 *Ib.*, 468; Anon.; 1 *Wend.*, 9; 9 *Abbotts' Pr.*, 374, decides that the publication must be 70 days; Stanton *a.* Ellis, 16 *Barb. Sup. Ct. R.*, 399; affirmed in 2 *Kern.*, 575.) There was a fatal defect as to time of notice. Affidavit shows creditors residing more than 100 miles from New York; and 10 weeks' publication of notice was necessary. Only 9 weeks' notice was given.

III. Variance in the title of the newspaper printed in New York, in which the judge ordered the notice to be published, and that in which the proof of publication says it was published. The order was for the "newspaper entitled the *Evening* Day Book," the proof is of its publication in "the *New York* Day Book."

An omission also occurred in both the Day Book and Brooklyn Daily Eagle notices. In the former, the words "part 2" are left out, in describing the Revised Statutes under which the proceedings were had; and in the latter were left out the words "of the 5th chapter." These omissions render the notice vague and uncertain, and are an essential defect.

2d.—IV. There is a want of proper specifications in the affidavits of the petitioning creditors, as to the nature of their debts,—how, and for what they arose, when and where, and who were the parties, the consideration and character of the indebtedness, accounts not annexed as copies thereof, &c. All and each of these should appear on the papers; and without a

full and proper statement thereof, the intent to defraud is fairly inferrable, and need not be proved. (Slidell *a.* McCrea, 1 *Wend.*, 156; Small *a.* Wheaton, 179, midway of the page; M'Nair *a.* Gilbert, 3 *Ib.*, 344.)

In the affidavit of William Wilson, one of the petitioning creditors, it does not appear when or where the indebtedness arose, for what, nor the price, nor with whom the contract was made, nor any circumstances showing whose debt it is, unless it be Smith's.

The same objection to the affidavit of Samuel Suydam; and the same objection is even more pertinent to that of William Munger, who swears that his claim is "for goods, wares, and merchandise sold and delivered, and various stocks secured by indorsement of note drawn by Mr. Smith, now due and payable," without specifying the particulars of the transaction, or annexing the original or copy-evidence of indebtedness. The only inference which can be drawn from such a vague and imperfect statement is, that it was a transaction between Munger and Smith. Mr. Munger gives no date or place of sale, does not say who bought or who sold, what kind of stocks, or what description of goods, &c., whether sold at one or ten different times, no date of note or time of credit. A most indefinite and uncertain statement. (2 *Rev. Stat.*, 199, § 7; 2 *Hilt.*, 338.)

Such statements would not uphold a judgment upon confession. (3 *Abbotts' Pr.*, 375; Freleigh *a.* Brink, 16 *How. Pr.*, 272; 12 *Ib.*, 410.) Lockwood *a.* Finn *et al.* (13 *Ib.*), decides the particular point in question. (2 *Kern.*, 245; 1 *Wend.*, 156.) Then, how much more full, precise, and particular should every such statement be made, in a case where the parties' just claim is to be swept away by a judicial statutory proceeding!

3d.—V. The defendant's discharge is invalid, as to this cause of action, because the plaintiffs, parties to the contract, were residents of another State. The note was dated in another State. Section 35 of the act has received the following conclusive adjudications: 3 *Seld.*, 500; 2 *Wend.*, 457; 12 *Ib.*, 102; 19 *Ib.*, 151, 630; 3 *Paige*, 338; 5 *Hill*, 244; 3 *Comst.*, 217; 12 *Wheat.*, 213, 369; 6 *Pet.*, 349, 635; 3 *Story on Const.*, 256; 10 *Metc.*, 594; 10 *Abbotts' Pr.*, 246; 4 *Wheat.*,

209; 5 *How. U. S.*, 295; 8 *Barn. & Cres.*, 477; 4 *Barn. & Ald.*, 654; 6 *Johns. Ch.*, 59; 4 *Wheat.*, 122; 2 *Story*, 383; 9 *Abbotts' Pr.*, 404; Baldwin *a.* Hale, 3 *Am. Law Register*, 462.

VI. The discharge does not set forth that the due proof was furnished of the notice having been given as required by law, personally or by mail, twenty or forty days before the day of showing cause. It seems that the clause on that point is erased from the printed blank used as the discharge. Several of the creditors said to have been "personally served" are ready to swear that no such notice was ever given to them. The schedule was not signed, nor was the petition sworn to by any of them.

The court rendered the following decision:

The above cause having been tried before me, without a jury, by consent of the parties, and thereupon submitted, I find as follows:

That the facts stated in the complaint and answer are true; and that the discharge stated in the answer is a bar to the plaintiffs' recovery.

I therefore order judgment to be entered for the defendant, with costs.

From the judgment entered under this, plaintiffs' counsel appealed.

John Fitch, for the appellants.

E. R. Bogardus, for the respondent.—I. The principal objection to the discharge is that it is invalid against a non-resident of this State. The precise point involved in the present case is, whether the State courts of New York shall lend their aid in enforcing a contract to be performed in New York in favor of a non-resident plaintiff against a debtor duly discharged by the New York insolvent laws. This statement of the point, of itself, excludes every case cited by the plaintiff under his fifth point as inapplicable.

This is to be treated as a New York contract. (See Cook *a.* Maffit, 5 *How. U. S.*, 295; Parkinson *a.* Scoville, 19 *Wend.*,

150; Witt *a.* Follett, 2 *Ib.*, 457; Donnelly *a.* Corbett, 3 *Seld.*, 500; Burrill *a.* Rice, 5 *Gray*, 539; Capers *a.* Johnson, *Ib.*, note, 539; Scribner *a.* Fisher, 2 *Ib.*, 43.)

Donnelly *a.* Corbett (3 *Seld.*) simply decides what many other cases also decide, that a suit can be maintained in a State which did not grant the discharge,—*i. e.*, that the local law of that State has no extra-territorial effect, and certainly does not require its enforcement. Thus they are void as impairing the obligation of contracts, wherein they assume to discharge the obligation of the debtor.

The local law of discharge takes away the remedy in the State courts of the State which granted the discharge, but does not operate in actions brought out of the State, as against non-residents.

The case of Baldwin *a.* Hale (*Amer. Law Register*, vol. 3, No. 8, new Series, June, 1864, p. 462) does not in any manner conflict with these views, and decides that "a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained."

II. In reply to the other objections:

Signature to affidavits are not necessary, no statute requires it. (Haff *a.* Spicer, 3 *Cai.*, 190; *Colem. & C.*, 495; Jackson *a.* Virgil, 3 *Johns.*, 540.)

Hathaway *a.* Scott (11 *Paige*), to the contrary, relates merely to matters of practice in chancery, having nothing to do with statute affidavits.

The publication was sufficient. *In re* Underwood (3 *Cow.*, 59), the publication was but six weeks instead of ten, and the affidavit was of publication for six weeks only.

Here the affidavit swears to ten weeks' publication; and the date given afterwards, at most only introduces an ambiguity. The fact of ten weeks' publication is conceded. No discharge was ever vacated on such a frivolous pretext.

Besides, this objection ought properly to be taken on certiorari.

Rusher *a.* Sherman (28 *Barb.*, 416—decided at general term, first district, opinion by INGRAHAM, J.) declares that none of these objections can be taken collaterally, but only on certiorari.

All the following points of plaintiff (except points IV. and

V.) are palpably within the express decision of Rusher *a.* Sherman (28 *Barb.*, 416), and cannot be availed of in this suit. (See also, 24 *Barb.*, 649; 2 *Kern.*, 575; 12 *N. Y.*, 579.)

III. The specifications in the affidavits are fully up to the requirements of the act under which defendant's discharge was granted. (Taylor *a.* Williams, 20 *Johns.*, 21; In Matter of Hurst, 7 *Wend.*, 239; McNair *a.* Gilbert, 3 *Ib.*, 344.)

By the Court.—Clerke, J.—The preliminary objections made to the proceedings upon which the discharge is founded, if tenable at all, with the exception of the fourth, could be taken advantage of only by certiorari, and not in this collateral manner. As to this fourth objection, undoubtedly, in order to give the officer jurisdiction, it is necessary that the affidavits of the petitioning creditors should show the amount, nature, and consideration of the debt, and that the creditor has received nothing to become a petitioner.

The affidavits of the petitioning creditors in this case contain all these requisites; the objection is entirely untenable.

The objection to the discharge itself is equally untenable; it recites all that is necessary to give the officer jurisdiction.

The only serious question, therefore, is whether creditors residing in another State at the time the contract was made, and still residing there, are entitled to recover in the courts of this State, when the defendant afterwards obtained a valid discharge from all his debts, under the act entitled "Of Voluntary Assignments made Pursuant to the Application of an Insolvent and his Creditors." Two of the promissory notes on which this action is founded were made in Philadelphia, the third was made in Buffalo in this State; but the three, by express terms, were payable at White's Bank, Buffalo.

The decisions upon this subject appear to me unsettled, if not conflicting, although the language employed by the judge who delivered the opinion of the court in Donnelly *a.* Corbett (3 *Seld.*, 500) is so general as to appear at first to be an analogous case; but it is in reality very different. The discharge in that case was obtained in South Carolina; the plaintiff was a resident of this State, and brought his action in the courts of this State.

The discharge, of course, could be no bar to an action in this

State, brought by one of its residents. It could not be pretended that any such discharge could have an extra-territorial effect.

Parkinson *a.* Scoville (19 *Wend.*, 150) is very similar to the case before us. The plaintiff, who was never a resident of this State, brought his action here. The contract was made, and was to be performed, in this State. The discharge was decided to be available in all cases where the contract was made within this State, or where the contract was to be performed within this State. Indeed, the act (§ 30) makes it expressly applicable to any contracts "to be executed within this State." Burrill *a.* Rice, 5 Gray, 539; Capers *a.* Johnson, Ib., note, 539; Scribner *a.* Fisher, 2 Ib., 43, are cases precisely similar to this.

The notes were made payable in Massachusetts by a debtor there, though dated in another State; and the discharge was held to be a bar in Massachusetts.

Of course, when contracts are made between citizens of the same State, they are made in reference to the existing laws of the State.

It is a well-established principle, also, that where contracts made in one country are to be performed in another, the law of the latter governs not only in regard to the construction, but in regard to the remedy when it is sought there. If the act in question merely affected the remedy, we would, therefore, have no difficulty in deciding in favor of the efficacy of the discharge in the case before us.

In form at least, it absolves the debtor from the performance of his contract. As far as this State is concerned, the act under which this discharge was granted is a bankrupt law, exonerating the debtor from all further liability in this State; but, as far as the residents of other States are concerned, does it do any thing more than affect the remedy? When they come here and bring actions in our courts, they seek a remedy against a citizen of this State for the non-performance of a contract which he promised to perform within this State. But the insolvent act itself expressly says that the discharge shall apply, not only to contracts made within this State, but to those which are to be executed within it. It has no qualification, and makes no distinction between residents and non-residents; and when non-residents think fit to enter into a contract to be per-

formed in this State by a resident of it, I can see no good reason, founded on comity or constitutional law, why the discharge should not be effectual, when the contract is sought to be enforced through the instrumentality of the courts of this State. In accordance with general principles of jurisprudence, I can discover no reason "why laws of this nature should not be held valid within the territorial limits of the State by which they are passed, even when they act upon contracts made in another county or upon citizens of another country, although beyond the limits of the State; they have no force except such as may be given to them by comity."

When the contract was to be executed within the State, the reason is still stronger why the discharge should be recognized as an avoidable defence in all cases, when the redress is voluntarily sought in the courts of the State.

I am aware that it has been decided in the Supreme Court of the United States (Cook *a.* Moffatt, 5 *How. U. S.*, 295) that the insolvent law of Maryland could not discharge one of its own citizens from a contract to be executed in New York, made with citizens of that State. The suit was brought in Maryland. The principle of the decision was, that the contract and the remedy should be governed by the law of the place where it was to be executed. So that I may say, with SAVAGE, Ch. J., in Van Hook *a.* Whitlock (26 *Wend.*, 54): "I am not aware that it has been directly determined by any case in the Supreme Court of the United States, that the discharge would not be a bar against a citizen of another State, where the suit is brought in the court of the State in which it was granted, and upon a contract made therein, posterior to the law."

I add, "or to be executed therein," posterior to the law.

The judgment should be affirmed, with costs.

PARKS *a.* PARKS.

Supreme Court, Seventh District; General Term, March, 1865.

MOTION TO SET ASIDE PROCEEDINGS.

After an answer is served, a defendant is too late to move to set aside the plaintiff's proceedings, on the ground that the action is prosecuted without the appointment of a guardian.*

Appeal from an order.

The action was brought by Amelia J. Parks, an infant, against James W. Parks.

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* S. P. Rutter *a.* Puckhoffer, 10 *Bosw.*

In the case of GLOVER *a.* HAWS (*Supreme Court, First District; At Chambers, November*, 1862), it was *Held*, that the appointment of a *guardian ad litem* for an infant defendant who had not been served with summons is void.

The cause came before the court on a motion to require a purchaser under a foreclosure sale to complete his purchase.

The action was brought by John Glover, executor, against William E. Haws and others for a foreclosure of a mortgage, executed by Haws and wife to the plaintiff. One Mary P. Davis, a judgment creditor of Haws, was a party defendant. Her judgment was a lien upon the property. She was an infant over fourteen years of age. No summons or complaint was served upon her in the present action. An order was made appointing R. C. Beaunah *guardian ad litem* for Mary P. Davis; the guardian put in answer; there was a reference, the proper proofs taken, and decree and sale. Charles F. Hunter purchased the property under the sale, but refused to complete his purchase because Mary P. Davis was not served with summons. The plaintiff made the present motion.

David Hawley, for the motion.—I. The amendment of the Code in 1862 gives the court power in foreclosure and partition cases, where the infants reside out of the State, to appoint guardian on application of the plaintiff at any special term, &c. Section 116 of the Code, to which this is an addition, gives the appointment on application of the infant, if over 14, and applying within 20 days after service of the summons; if under 14, or neglecting so to apply, on the application of any other party or of friend, &c. So that the fact that in case of non-

An order was made at special term setting aside the summons and complaint, on the ground that the plaintiff, though an infant, prosecuted her action without the appointment of a guardian. The order was to the effect that the proceedings be set aside, unless the plaintiff within twenty days should pro-

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resident infant-defendants no time after service or for application, &c., is specified, and that it is confined to plaintiffs, when in other cases the infant, other parties, or friends can apply, shows that the intention is not to require a previous service of the summons.

II. The authority of the court to appoint guardians of infants does not come from the statute, but is a part of its general jurisdiction over minors and their estates. (2 *Barb. Ch. Pr.*, 219.)

So that the court having appointed a guardian, even though the mode of appointment was irregular in not being according to the statute, the appointment having been made, it is good, and the acts of the guardian under it binding. (18 *Wend.*, 563).

Like decree by consent, or order for maintenance where infants are concerned, reference is usually required; but a decree or order made by consent without reference is equally binding. (Wall *a.* Bushby, 1 *Bro. C. C.*, 484; Tillotson *a.* grave, 3 *Mad.*, 494.)

Marcus Sackett, opposed.—I. Civil action in the courts of record of this State shall be commenced by the service of summons. (*Code*, § 127.) The summons shall be served by delivering a copy thereof in this case to the defendant personally. (*Ib.*, § 134.) Then comes section 135, providing that in case defendant cannot be found in the State, the summons may be published, &c. The summons should have been published.

II. After the service of the summons, comes the appointment of a *guardian ad litem*. Section 116 provides, the guardian shall be appointed, "if the infant does not apply, then any other party to the action, after notice of the application," &c. Prior to 1862 there was no mode pointed out for the service of the notice of application for the appointment of guardian, if the infant resided out of the State. This addition to section 116 was intended to supply this omission.

III. Had it been intended as a substitute for the service of summons, it would require an amendment to section 134, or a clause expressly denoting that it was to change the mode of service of summons or the mode of commencing civil actions.

IV. Summons must be served before guardian could be appointed. (9 *Paige* 255. See Cook *a.* Farren, 34 *Barb.*, 95; 18 *How. Pr.*, 43; 3 *Ib.*, 109; 14 *Ib.*, 380; 5 *Ib.*, 341–45.)

BARNARD, J.—The amendment to section 116 merely regulates the mode of the appointment of a *guardian ad litem* for a non-resident infant, after such infant has been brought into court by some one of the modes of serving the summons recognized by the law. It was not intended to, and does not obviate the necessity of bringing the infant into court by service on him of the summons.

Motion denied.

cure the appointment of a guardian, and pay ten dollars costs of motion.

From this order the plaintiff now appealed to the general term.

C. Jordan, for the plaintiff, appellant.

H. H. Woodward, for the defendant, respondent.

By the Court.*—The case of Fellows and Hawes *a.* Niver (18 *Wend.*, 563) is decisive of this case. In that case the court held that, the defendant having pleaded to the merits, he had waived the irregularity, and admitted that the plaintiffs were *recti in curia.* The statute in relation to the appointment of guardians for infant parties, when that case was decided, was substantially the same as provided by the Code of Procedure.

Order appealed from reversed, with $10 costs.

BROUGHTON *a.* MITCHELL.

Supreme Court, Sixth District; General Term, May, 1865.

Appeal to Supreme Court in Cause originating in Justice's Court.

Exceptions taken, upon the trial, in a County Court, of a cause brought to that court by appeal from a justice's court, may be reviewed in the Supreme Court on appeal thereto from the judgment of the County Court, although a motion for a new trial has not been made in the County Court.†

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* Present, J. C. Smith, Wells, and E. Darwin Smith, JJ.

† It was held in Dixon *a.* Buck (42 *Barb.*, 70) that although, by subdivision 6 of section 366 of the Code as amended in 1862, either party may move for a new trial in the County Court on a case or exceptions, either before or after judgment has been entered, a party is not obliged to do so before appealing to the Supreme Court. A notice of motion for a new trial in the County Court is not

Broughton *a.* Mitchell.

A ruling of the County Court that is excepted to, is a decision of that court, and it need not be passed upon a second time in that court to authorize the Supreme Court to review it.

The rulings of a referee on the trial of a cause in the County Court are deemed decisions of such court for this purpose.

The Supreme Court may now review judgments of the County Court brought up by appeal, on exceptions that are made a part of the record, though the ex-

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necessary to be given before the case or exceptions can be made part of the judgment-roll. If the case is embraced in the return of the clerk, the Supreme Court will presume that it has been properly attached and filed, with the other papers constituting the judgment-roll, even though the certificate of the clerk does not show affirmatively that it has been attached and filed. The presumption is that it has been done correctly. If it is not part of the judgment-roll, the respondent should move to strike the case from the return, on affidavits showing what the fact is in regard to it, or to have the return amended so as to contain the roll only. (*Ib.*)

And in Whitney *a.* Wells (28 *How. Pr.*, 150), on an appeal from a judgment of the County Court upon a case containing exceptions, in an action originating in a justice's court, it was held that the Supreme Court could not set aside the verdict and grant a new trial on the ground that the verdict was against evidence; the motion for a new trial on that ground should first be made in the County Court before an appeal. But it was further held that the Supreme Court might reverse the judgment of the County Court, and grant a new trial in that court for an error in the charge of the county judge.

In the case of GANNON *a.* CAMPBELL (*Supreme Court, Second District; General Term, May*, 1865. Present, SCRUGHAM, LOTT, and BARNARD, JJ.), it was held that an appeal lies to the Supreme Court at general term from an order of the city judge of Brooklyn, denying a motion for a new trial made upon the judge's minutes, without reference to whether any appeal has been taken from the judgment.

This was a motion to dismiss an appeal taken under section 264 of the Code. The action was one to recover damages for the conversion of personal property, tried before the city judge of the city of Brooklyn and a jury. The jury found a verdict for the plaintiff. Upon the rendition of the verdict, the defendant made a motion before the city judge for a new trial upon his minutes, and the same was granted and the verdict set aside. From the order granting the new trial upon the judge's minutes the plaintiff appealed, and made a case or bill of exceptions in the usual form.

The defendant now moved to dismiss the appeal, upon the ground that the order of the judge granting a new trial upon his minutes was not appealable, unless there was a judgment and an appeal from that, and that the court could not entertain the motion without the judge's minutes before them. But the general term denied the motion to dismiss the appeal, holding that it was fully authorized by so much of section 264 as provides "that when such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be heard," and that the appeal was independent of the appeal from a judgment, and was the right of either party.

Upon hearing the appeal, the order of the city judge granting a new trial

ceptions have not been passed upon in the former court by a motion for a new trial in that court; and it may reverse the judgments of such court and grant new trials therein.

The case of Carter *a.* Werner (27 *How. Pr.*, 885) disapproved, and that of Monroe *a.* Monroe (*Ib.*, 208) adhered to.

Appeal from a judgment of the County Court of Delaware County.

This action was brought by Nathan Broughton before a justice of the peace, to recover from Ransom Mitchell for an alleged breach of warranty of a horse the defendant sold to the plaintiff for $125. The plaintiff alleged that the defendant warranted the horse sound and right every way, and that he was unsound in his right hind-leg, and was vicious when being shod.

The justice rendered a judgment in favor of the defendant for costs. The plaintiff appealed from the judgment to the Delaware County Court, where the cause was duly referred to a referee to hear and determine. The referee reported and decided that the horse was all right as warranted by the defendant except as to the soundness of the right hind-leg, and that he was unsound in that leg, which unsoundness injuriously affected his gait and travel; and that the plaintiff had sustained damages by reason of the premises to the amount of fifty dollars; and that the plaintiff was entitled to recover that sum of the defendant, besides costs. The defendant made a case containing his exceptions, which was filed and made a part of the judgment-roll. After judgment was entered in favor of the plaintiff, the defendant appealed therefrom to this court, without making any motion for a new trial in the County Court.

L. L. Bundy, for the plaintiff.

William Youmans, Jr., for the defendant.

upon his minutes was reversed, and judgment ordered for the plaintiff on the verdict.

L. A. Fuller, for the plaintiff.

Philip S. Crooke, for the defendant.

By the Court.*—Balcom, J.—The plaintiff's counsel has made the point that the defendant could not appeal to this court until the County Court had passed upon the exceptions on a motion for a new trial in that court. He thinks the reasoning of the judge who delivered the opinion in Carter *a.* Werner (27 *How. Pr.*, 385), in the fifth district, is more satisfactory than my opinion in Monroe *a.* Monroe (*Ib.*, 208). It is true I overlooked a statute in Monroe *a.* Monroe, which is cited in Carter *a.* Werner. But that statute (2 *Rev. Stat.*, 423, § 78) greatly strengthens my conviction that my conclusion in Monroe *a.* Monroe was correct. Neither that statute nor the preceding sections, 77, 76, and 73, have been repealed by the Code, and they are in force so far as they are applicable to civil actions that are triable in county courts. (*Laws of* 1847, vol, 1, 330, §§ 36, 37.) Courts of Common Pleas could grant new trials on exceptions, or on the ground that the verdict was against evidence. (2 *Rev. Stat.*, 208, § 1, subd. 2; *Ib.*, 422, § 76.) The County Court may now do the same. (*Code*, § 30, subd. 13.) The Supreme Court, before the Code, could review judgments of the Court of Common Pleas or County Court, brought up by writ of error, on exceptions that were made part of the record, though no motion for a new trial had been made in those courts. (2 *Rev. Stat.*, 423, § 80; *Laws of* 1847, vol. 1, 323, 324, §§ 16, 17.) The Supreme Court may now review judgments of the County Court brought up by appeal on exceptions that are made a part of the record, though the exceptions have not been passed upon in the former court by a motion for a new trial in that court; and it may reverse the judgment of such court and grant new trials therein. (*Laws of* 1847, vol. 1, 323, 324, §§ 16, 17; *Code*, § 344.)

An appeal will also lie to this court from an order of the County Court granting or refusing a new trial in an action tried in that court. (*Code*, § 30, subd. 13; *Ib.*, § 344.)

But this court cannot grant a new trial in the County Court on the ground that the verdict was against evidence, until after a motion has been made in such court on that ground

* Present, Parker, Mason, and Balcom, JJ.

and denied, for the reason that such court must pass upon such a question, to authorize an appeal on that ground. (See Whitney *a.* Wells, 28 *How. Pr.*, 150.) A ruling of the County Court that is excepted to is a decision of that court, and it need not be passed upon a second time in that court to authorize this court to review it; and the rulings of a referee on the trial of a cause in the County Court are deemed decisions of such court. (*Code*, § 272.)

These reasons, and those assigned in Monroe *a.* Monroe, satisfy me that we should adhere to our conclusion in that case, and review the exceptions taken on the trial of this cause, though no motion for a new trial has been made in the County Court. None of the questions made respecting the viciousness of the horse when being shod need be noticed, for the reason that the final decision of the referee on that question was in favor of the defendant.

And I am of the opinion the referee did not err in any ruling he made upon the trial, on the branch of the case he decided in favor of the plaintiff.

My conclusion therefore is, that the judgment in the action should be affirmed, with costs.

Parker and Mason, JJ., concurred.

Note to Broughton *a.* Mitchell.

The County Court has jurisdiction "to grant new trials, or affirm, modify, or reverse judgments in actions tried in such court upon exceptions, or case made, subject to an appeal to the Supreme Court." (*Code*, § 30, subd. 13.)

Section 366, subd. 5. "The [County] Court shall have the same power over its own determinations, the verdict of the jury, and shall render judgment thereon in the same manner as the Supreme Court in actions pending therein."

Subd. 6. "Either party may move for a new trial in said court on a case or exception, or otherwise, and such motion may be made before or after judgment has been entered; and the provisions of this act in relation to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the

court, making and settling case and exceptions, motions for new trials, and making up the judgment-roll in the Supreme Court, are hereby made applicable to all appeals brought up for trial as in this chapter provided." (*Code*, § 366.)

In the Supreme Court, the defeated party, when he desires a new trial for erroneous ruling of the judge at the circuit, is not obliged to move for a new trial before judgment upon his exceptions, either at the special or general term. He may prepare his exceptions and have them settled, await the entry of judgment, have the exceptions attached to and form a part of the judgment-roll, and appeal to the general term from the judgment; and in such case argue his exceptions on such appeal at the general term and ask to have the judgment reversed, instead of asking simply to have a new trial granted. (Morange *a.* Morris, 12 *Abbotts' Pr.*, 164; Jackson *a.* Fassit, *Ib.*, 281; 32 *Barb.*, 568; *Ib.*, 650.)

If this course is allowable in the Supreme Court, there is no good reason why the defeated party in the County Court may not have his exceptions settled and filed and made a part of the judgment-roll, and without making a motion for a new trial in that court, appeal in the first instance on the law of the case to the general term of the Supreme Court.

It is provided by section 344 of the Code, that "an appeal may be taken to the Supreme Court, from the judgment rendered by a County Court, or by the mayors' courts or recorders' courts of cities." By section 346, such appeals must be heard at a general term. But security must be given upon such appeals according to section 345.

Any party aggrieved by a judgment of the County Court may appeal from it. (*Code*, § 325.) And the appellate court may reverse, affirm, or modify the judgment appealed from. (*Code*, § 330.)

The cumulative remedy given to the defeated party by a motion for a new trial in the County Court, does not deprive him of the right to appeal in the first instance from the judgment of that court to the Supreme Court.

The mode of reviewing the judgments of county courts is not affected in the least by section 351 of the Code, which repeals all previous statutes, providing for the review of judgments in civil causes, rendered by courts of justices of the

peace, as Mr. Howard seems to suppose. (See vol. 29 of his Reports, 68.)

A new trial for irregularity, or for any error of the jury at the circuit, must be applied for in the first instance at a special term of the Supreme Court; and so a new trial for irregularity or for an error of the jury in the County Court must be asked for in that court.

This note is made in consequence of the criticism upon Broughton *a.* Mitchell (29 *How. Pr.*, 68). (B.)

LOESCHIGK *a.* ADDISON.

New York Superior Court; General Term, July, 1865.

JUDGMENT.—DECISION OF JUDGE.—APPEAL.—CREDITOR'S SUIT.—FRAUDULENT CONVEYANCES.

Where a cause is tried upon issues of fact, by the court without a jury, the judgment entered upon the decision must not contain any provisions not embraced in the decision.

The conclusions of law found by the court must contain all that goes into the judgment.

If any thing is inserted in the judgment which is not contained in the decision, the judgment is not merely irregular, but is substantially erroneous, and will be reversed on appeal.

A surviving partner is vested with the partnership assets for the purpose of applying them to the payment of partnership debts equitably; and has not power to assign the whole assets to the preference of some creditors and the exclusion of others. (Per MCCUNN, J.)

A creditor's action should not be absolutely dismissed for defect of parties, unless the objection be taken by pleading. (Per MCCUNN, J.)

What is sufficient evidence of fraud to avoid a voluntary gift made by a debtor, considered. (Per MCCUNN, J.)

Appeal by both parties from a judgment.

This action was brought by the plaintiffs, William Loeschigk, Otto Wesendonk, Gustavus Kutter, and Edward Luckemeyer,

judgment-creditors of Samuel D. Addison, as survivor of Joseph Addison, against the defendants, to set aside as fraudulent and void certain conveyances, assignments, and transfers of property made by Samuel D. Addison to the defendant Rachel A. Addison, and also to the defendants Hatfield & Marshall.

The cause was tried by Mr. Justice Barbour, without a jury, who found the facts established by the evidence, and thereupon rendered the following decision:

And, as conclusions of law upon the facts, I do decide and determine: That the deed of September 18, 1857, from Samuel D. Addison to Amos F. Hatfield, and the deed of the same premises from said Hatfield to Rachel A. Addison, are not fraudulent and void as against the plaintiffs; and that the goods mentioned in the complaint as transferred by Samuel D. Addison, survivor, to Hatfield & Marshall, cannot be reached in this action; and the said Samuel D. Addison, survivor as aforesaid, had no power to assign the said collateral securities of Addison Brothers in the Pacific Bank to the said Hatfield & Marshall; and that the said assignment be declared void.

Upon filing such decision, the clerk entered the following judgment:

[TITLE.]

"This cause having been tried before the Hon. John M. Barbour, without a jury, on the issues joined by the pleadings; and the decision in writing of the justice, containing a statement of the facts found, and the conclusions of law separately, according to the statute in such cases made and provided, having been filed; now, on motion of Mr. Watson for plaintiffs, it is ordered, adjudged, and decreed that the deed of September, 1857, from Samuel D. Addison to Amos F. Hatfield, is not fraudulent and void as against the plaintiffs, but is valid; and that the goods mentioned in the complaint as transferred by Samuel D. Addison, survivor, to Hatfield & Marshall, and the leases mentioned in the complaint, cannot be reached in this action; and that the assignment of the collateral securities of Addison Brothers in the Pacific Bank to Hatfield & Marshall

is void for want of power in the said Addison, as survivor; to make the same; that the said defendants Hatfield & Marshall assign, under oath, to a receiver to be appointed by this court, all their interest in collateral securities in the Pacific Bank, which were assigned to them by Samuel D. Addison, and as indemnity against the suits in replevin aforesaid, as mentioned in the pleadings and proofs; and that said Hatfield assign to the receiver the promissory notes of James N. Clark, Cordell, Avery, and Burr, William Collins, H. A. Lucas, and all other securities held by him, in the same manner as the notes above-named.

"And that the said Rachel A. Addison, administratrix of the said Samuel D. Addison, join in the said conveyance; and that the plaintiffs hereby have judgment to that effect, and for their costs of this action, adjusted by the clerk at $101.06, against the defendants Amos F. Hatfield and Jesse A. Marshall, and have execution thereon.

"And it is further adjudged and decreed that the receiver to be appointed in said suit pay to the plaintiff the amount of said judgments in the complaint mentioned out of the proceeds of property of the defendant, to be assigned to him as hereinafter mentioned; and that the said receiver bring the residue of the proceeds of the said property into court to abide the further order thereof; and that the complaint be dismissed as against the said Rachel A. Addison individually, and her costs, adjusted by the clerk at $53.81, to be paid by the receiver out of the fund in his hands; and if the same be insufficient, that said costs be paid by the plaintiffs.

"Robert D. Livingston, Clerk.

"Filed, January 19, 1862, at 3 P. M."

From this judgment all the parties appealed; the plaintiffs appealing from some parts, and the defendants respectively from those parts which awarded costs to the plaintiffs or to the defendants, to be paid out of the fund.

W. Watson, for the plaintiffs.

A. R. Dyett, for the defendants.

By the Court.*—Monell, J.—The only judgment which could be entered upon the decision of the justice who tried this cause was, that the deed to Rachel A. Addison was not fraudulent and void; that the goods transferred to Hatfield & Marshall could not be reached in this action, and that the assignment of the securities in the Pacific Bank was void. This was the whole of the decision. The learned justice did not determine any other question, and the judgment which it was proper to enter should have embraced only the points decided.

The paper purporting to be a judgment, and which recites the decision of the court, and from which both parties have appealed, contains several provisions wholly unauthorized by the decision; such as adjudging the deed from Addison to Hatfield to be valid; that Hatfield & Marshall assign under oath, to a receiver to be appointed, their interest in the securities in the Pacific Bank; that Hatfield assign to the receiver the promissory notes of Clark, &c.; that Rachel A. Addison join in the conveyance; that the plaintiffs have judgment for their costs against Hatfield & Marshall; that the receiver pay the plaintiffs the amount of judgment out of the proceeds of the property to be assigned to him; that the balance of the proceeds be brought into court to abide the further order; that the complaint be dismissed as against Rachel A. Anderson individually, and her costs be paid by the receiver out of the funds in his hands, and if such fund is insufficient, the same to be paid by the plaintiffs.

There was no authority in the decision for any portion of the judgment above recited. The Code requires that, upon the trial of questions of fact by the court, its decision must be given in writing (the conclusions of fact and law being separately stated), and judgment is entered upon the decision. (*Code*, § 267.)

In Chamberlain *a.* Dempsey (14 *Abbotts' Pr.*, 241) this court decided that, in an action tried by the court without a jury, the only authority for entering judgment is the decision of the judge who tried the cause.

The clerk cannot go beyond the decision, and include any thing in the judgment not embraced in the decision.

* Present, Monoriff, Monell, and McCunn, JJ.

In the case before us the "decision" does not award costs to either party. Costs in this class of cases are wholly in the discretion of the court, and the question of costs must be disposed of by the court in its decision.

As I understand the requirement of the Code, and as determined in Chamberlain *a.* Dempsey (*sup.*), the conclusions of law must contain all that goes into the judgment; and it makes no difference that the judgment (as entered in this case) received the fiat of the justice who tried this cause. Such fiat (and there is no evidence in the papers that it had the fiat) was unnecessary, as the clerk, in filing the decision, is authorized to enter judgment without any other direction of the judge. (*Code*, § 267.) It is to the decision alone, therefore, that we must look for the determination of the judge; and any thing in the judgment, not in the decision, is improper and erroneous.

This is not an irregularity merely, but a substantial error. Parties cannot appeal from a decision, but from a judgment; and if the judgment is unauthorized by the decision, it must be set aside. (Chamberlain *a.* Dempsey, *sup.*, ROBERTSON, J.)

For the reasons stated, we think the judgment must be reversed, and as all the issues in the case do not appear to have been disposed of on the former trial, we think there should also be a new trial ordered.

MCCUNN, J.—Joseph Addison and Samuel Addison, drygoods merchants, transacting business at Nos. 304 and 306 Canal-street in this city, under the firm of Addison Brothers, commenced purchasing goods from the plaintiffs' firm of Loeschigk, Wesendonck & Co., in the year 1860. By July or August of that year the indebtedness on this account amounted to nearly $10,000. On opening the credit, Samuel D. Addison represented to the plaintiffs that the firm had a capital of $45,000 in stock and receivables; that he and his brother had been and would be careful in their business; that no fear need be entertained of their solvency; that they had an estate from their mother, and upon the death of their mother would be perfectly independent. Joseph Addison died on the 13th February, 1861. The plaintiffs recovered judgment for $6,806.32, a part of their demand against Samuel D. Addison as survivor, in this court on the 26th of June, 1861.

They recovered a like judgment for $2,263.95 in the Supreme Court in this district, Samuel D. Addison being a resident in the county of Kings. Transcripts of these judgments were filed in that county, and executions issued thereon accordingly to the sheriff thereof. Both executions were returned wholly unsatisfied.

This action was commenced on the 15th of April, 1862, against the surviving partner and his wife, and Amos F. Hatfield and Jesse A. Marshall, alleging that the several dispositions of property, which will be hereafter stated, were made with intent to hinder, delay, and defraud the creditors of Addison Brothers, and especially the plaintiffs, and were therefore void. Samuel D. Addison died during the pendency of this action, and his widow, Rachel A. Addison, having taken out letters of administration, the action was regularly continued against her as administratrix.

The action was tried before Mr. Justice Barbour, without a jury, and a judgment given from which all parties have appealed.

Immediately upon the death of Joseph Addison, his brother, Samuel D. Addison, caused to be prepared an inventory of the goods remaining on hand. They were invoiced at $65,000, and Samuel D. Addison assuming power so to do as surviving partner of the firm of Addison Brothers, executed a bill of sale, dated February 20, 1861, transferring the whole stock to the firm of Hatfield & Marshall for the nominal consideration of $45,512.85. The latter firm took immediate possession of the goods and removed them to a store in Walker-street. The answers allege that the goods were not in fact worth more than $36,000, and that the bill of sale was made on the consideration and with the intent to secure debts due from Addison Brothers to Amos F. Hatfield and Jesse A. Marshall individually, amounting to over $45,000, for moneys lent to Addison Brothers between September 16, 1859, and January 18, 1861. Hatfield testified to loans by himself amounting to $24,500, and Marshall testified to his own loans, amounting to $20,000. Hatfield was the father-in-law of Samuel D. Addison, and Marshall's loans were made at Hatfield's request.

The defendants, Hatfield & Marshall, do not claim that this

was a purchase of the goods for the price stated in the bill of sale, or that the goods were accepted in payment or as a satisfaction for the debts due to Hatfield & Marshall respectively. On the contrary, they allege that they were received merely as a security for their demands, and set up good faith and diligent endeavor to sell the same to advantage; that they have not been able to realize on such sales already made at a greater rate than 60 per cent. on the invoices, and that they do not expect to realize more than $36,000 on the whole of them.

Soon after this transfer, two actions were brought against Hatfield & Marshall for certain portions of the goods, amounting in value to $8,000 or $9,000.

Receivables of Addison Brothers, *i. e.*, bills, notes, and accounts, were delivered to the Pacific Bank, to secure an alleged indebtedness to that bank. No particulars of these transactions appeared, except that the transfers to the bank were dated February 20 and 21, 1861. On March 2, 1861, Samuel D. Addison, as surviving partner, &c., by an assignment of that date transferred to Hatfield & Marshall the residuary interest in these receivables, to indemnify Hatfield & Marshall against damages arising from the failure of title in case the said stock of goods, or any part thereof, should turn out not to be in said Hatfield & Marshall, either by the result of the said then pending actions, or of any actions which might be brought within a reasonable time, and also "against the costs, expenses, and counsel-fees which they may be put to in defending any such action or actions."

Addison Brothers held a lease of the premises No. 40 Murray-street, in this city, of an annual rent of $5,000, for a term ending May 1, 1864. These premises were underlet at a considerable advance. On February 15, 1861, Samuel D. Addison transferred this term and the subleases to Amos F. Hatfield, and on August 17, 1861, Hatfield transferred or surrendered the lease for a consideration amounting to about $1,350.

This transfer is alleged to have been made to secure Hatfield for his accommodation indorsement on a note of Addison Brothers for $2,558.97, and for $800 lent them. Prior to September 15, 1857, Samuel D. Addison had a title to five lots of land in the city of New York, derived from his father. At

that date he conveyed these lots to this same Amos F. Hatfield, his father-in-law. This is admitted to have been a voluntary conveyance for the benefit of the grantor's wife. A pecuniary consideration of $13,000, expressed in the deed, is alleged by the defendants to have been inserted by a mistake of the scrivener.

The plaintiffs allege that at the time of this conveyance Addison Brothers were indebted to the amount of $80,000, and from that time until the failure in 1861 continued to be largely indebted, and at no time in a less sum than $80,000. Joseph Addison in his answer did not deny this allegation, or any part of it, except that he reduced the aggregate to $75,000. He alleged, however, that "all his then indebtedness (meaning of course at the time of the conveyance) had been paid or discharged before he contracted the debts to the plaintiff." He also says that "the conveyance was voluntary, and intended to pass the title of the said property to his wife, the said Addison (himself) and the said Addison Brothers still retaining and having sufficient and more than sufficient property to pay all his and their debts."

After her husband's death, Mrs. Addison answered this portion of the complaint in substantially the same terms.

No evidence was given of payment or satisfaction of any debt by Addison Brothers, or either of them, between the conveyance of the lots to Hatfield and the accruing of the plaintiffs' demands. No evidence was given that at the time of that conveyance Addison Brothers, or either of them, had sufficient property to pay $75,000, or, indeed, that they had at that date any property at all.

The debts due from Addison Brothers to Hatfield & Marshall, respectively, consisted in part of $20,000, borrowed on the 14th of September, 1859. Marshall lent them further sums amounting to $10,000 in the same autumn. Hatfield's other loans were in the autumn of 1860, and subsequently.

The losses by Addison Brothers in their business may be deduced from the following circumstances:

The receivables deposited with the Pacific Bank: this sum amounted in the aggregate to "nearly" $40,000. The debt due to the bank was $22,000; Mr. Buck, the cashier, testified that after crediting the amount realized, there remained

due to the bank a balance of about $3,000. The amount realized may therefore be stated at $19,000. Mr. Buck stated the nominal amount of the receivables to be $13,000 or $14,000. There is evidence to show that these are desperate. According to the evidence their whole nominal amount is almost $14,000. From the paper signed by Samuel D. Addison on March 2, 1861, pledging them to indemnify Hatfield & Marshall, it might be supposed that they amounted in round number to $21,000.

Addison Brothers may have had some other unpromising receivables amounting to say $2,000 or $3,000. There is no other evidence of losses by the firm in the regular course of their mercantile operations or otherwise.

It was found at the special term that Samuel D. Addison, on opening the credit with the plaintiffs, made the false representations alleged, and that Hatfield, when surrendering the case, was not aware of the fact that Sterns, one of the under-tenants, was solvent. No other disputed fact was passed upon. As conclusions of law, it was found that the deed of gift of the lots to Hatfield was not fraudulent and void as against the plaintiffs; that the stock of goods transferred to Hatfield & Marshall cannot be reached in this action; that Samuel D. Addison had no power to assign the securities in the Pacific Bank to Hatfield & Marshall; and that the assignment thereof should be declared void. Judgment was accordingly given, that all interest of Hatfield & Marshall and Samuel D. Addison in the said securities, and also certain other securities held by Hatfield, be assigned to a receiver and applied to the payment of the plaintiffs' demand. The action as against Rachel A. Addison individually, was dismissed with costs out of the fund in the receiver's hands, but to be paid by the plaintiffs, if such sums should prove insufficient. The plaintiffs had judgment for their costs against Hatfield & Marshall. The defendant, Rachel A. Addison, on the ground excepted that costs should have been awarded to her against the plaintiffs absolutely.

Hatfield & Marshall excepted to the decision that Samuel D. Addison had no power to assign the securities, and to the award of the costs against them. The plaintiffs excepted to each of the decisions against them.

The first and most interesting question in this case is, whether, upon the dissolution of this firm by the death of his partner, Samuel D. Addison had power, as surviving partner, to assign the whole stock in trade of Addison Brothers by way of preference to two of the creditors. By the common law a simple purchase of lands or chattels by two or more persons created a joint ownership, and upon the death of one before the severance the survivor or survivors took the whole; but it is well settled that this rule does not apply to mercantile partnerships. On the death of a partner his personal representative becomes entitled to his proportionate share of all chattels belonging to the firm, a tenant in common with the surviving partner or partners. (*Williams on Personal Property*, 219, 220; *Co. Litt.*, 181, a; Rex *a.* Collector of Customs, 2 *Maule & Selwyn*, 223.) Mr. Justice Story, in his Treatise on the Law of Partnership (§ 90), shows that partners do not occupy towards each other precisely the attitude either of joint tenants or of tenants in common, and as to the point in hand he says: "There is no survivorship in cases of partnership, as there is in joint tenancy. This has been the doctrine of the common law for more than three centuries." Again, in section 342, he says: "Here the remark already made becomes important, that a partnership is not, strictly speaking, either a joint tenancy or tenancy in common; and it is a universally established principle of the whole commercial world that the property and effects thereof do not belong exclusively to the survivors, but are to be distributed between them and the representatives of the deceased in the same manner as they would have been on a voluntary dissolution *inter vivos*."

The point was subjected to a most searching and thorough investigation by the English Court of Exchequer, in 1857, when Judge Story's doctrine was distinctly affirmed in a unanimous judgment. Buckley *a.* Barbour, 6 *Exchr., Welsby, H. & Gord.*, 164; see Kemp *a.* Andrews, 3 *Levins*, 290.)

It is, therefore, quite clear that, at least in respect to one moiety of this stock in trade, Samuel D. Addison had no title, nor any authority whatever to convey it. The same principles apply to the lease and sublease of the Murray-street store.

In the choses in action belonging to the partnership, held by the Pacific Bank, Samuel D. Addison had, by survivorship, the

sole right of action, and consequently he had what may be called the legal title. But he held this merely as trustee; for in equity the share of the deceased partner in his portion devolved on his representatives. (*Williams on Personal Property*, 220, and cases cited in notes.)

The sweeping dispositions made by the surviving partner immediately upon his brother's death bear strong *indicia* of a fraud. The whole stock in trade, the leasehold interest, in fact every scrap of property belonging to the firm, except the choses in action, was transferred within a week to the survivor's father-in-law, and the choses in action soon went in the same direction. Viewed merely as a preference of one favored creditor over all others, this series of transactions is subject to many unfavorable observations. Its effect upon the present plaintiffs presents a case demanding relief, if the law can afford it. These plaintiffs were induced to sell their goods on credit to Samuel D. Addison, in 1860, on a false and fraudulent representation by him that he owned the inheritance that had come to him from his father, and that his firm had a fair capital in hand. When the representation was made, the paternal estate had been transferred to his father-in-law, Hatfield, as a gift to Hatfield's daughter, and the pretended capital, if any there was, consisted of loans made by the same Hatfield, whose confidential creditor stood ready, with the co-operation of his son-in-law, the fraudulent purchaser, to make that very capital an excuse for seizing, in satisfaction of his demand, the identical goods they purchased from the plaintiffs. Doubtless there was an understanding between Mr. Hatfield and his son-in-law, that, as the phrase goes, his demand should be deemed confidential. But any one, who looks at the effect of the arrangement between them, will be struck with the appositeness of Judge Duer's remarks upon a similar case. He says: "A secret confidence by which the public is deceived, and creditors who were excluded from its knowledge and its benefits are made the victims of their credulity and ignorance, a confidence which in respect to third persons is a source of delusion and an instrument of fraud, assuredly deserves any other name than that of honorable; it is not an agreement that it implies, but a conspiracy." (Nicholson *a.* Leavitt, 4 *Sandf. Sup. Ct. R.*, 281.)

The bill of sale was not truthful. It professed to be a sale as for a cash payment, and recited dollars and cents, so as to give it the color of a business transaction. The precise motive of the prompt removal of the stock to another store is not explained, but it looks very like a precaution to avoid the presumption of fraud, which attaches to a transfer by a debtor in failing circumstances if unaccompanied by a change of possession. Considering that the transaction was between confidential friends, father and son-in-law, that Addison Brothers had no longer an existence or need of a store, this prompt change of location, with the careful notice of the fact in the agreement pledging the choses in action, is like that over-caution which is one of the settled *indicia* of fraud, which evince a diffidence in the rectitude of the transaction and excites a corresponding solicitude to provide defences for its protection. (Sands *a.* Codwise, 4 *Johns.*, 567, 591; 3 *Desausure*, 291.)

It is not necessary to follow to their conclusion the grave suspicions that attach to this transaction. The transfer of the choses in action, as an attendant upon it, is subject to so many objections that it cannot be sustained. A surviving partner of a dissolved firm conveys all its stock in trade to his father-in-law, a favored creditor, including at least one interest which he had no power to convey; and then mortgages all the remaining estate of the firm to the same creditor, as an indemnity not only against any failure of title, but against the remotely contingent future expenses which he may incur for counsel or otherwise, in defending all actions which any one may bring against him to test the validity of the conveyance.

No limit is assigned to the number or character of the suits thus indemnified against. They are required, indeed, to be commenced within a reasonable time; but how long a time is that? When will they terminate? This surviving partner has ordained that the business creditors of Addison Brothers must stand still, "in patient expectation," until the father-in-law shall have run the gauntlet of the law in any number of actions and defeated all opponents; and must then be contented with what may be left for them after that gentleman shall have liberally compensated his counsel for their achievement in his

behalf. Such an act carries the much-abused privilege of giving preference far beyond any thing which has hitherto been tolerated. If it had no other fault, its inevitable effect to delay creditors to an indefinitely remote period marks it for condemnation as falling within the very letter of the statute, and wholly indefensible on this very ground.

It is adjudged to be fraudulent for a failing debtor to authorize his voluntary assignee to sell on credit. (Nicholson *a.* Leavitt, 2 *Seld.*, 517; 3 *Kern.*, 219; 17 *N. Y.*, 17.)

The transfer of the receivables was plainly unauthorized by law and a fraud upon creditors.

I return to the question of power in the surviving partner to make the bill of sale of the stock in trade, and the transfer of the lease. It may be thus stated.

Having the formal legal title to an individual portion of the chattels, and the entire formal title to the choses in action which constituted the stock in trade of the firm, has a surviving partner the *jus disponendi* even of what is thus legally vested in him, so that he can exercise the power of making an assignment of the whole property to a favored creditor, to the exclusion of all others having demands against the dissolved copartnership?

The firm-creditors have in equity a preference over creditors of the individual partners; and on the other hand, the creditors of the individual partners may justly insist that the firm-assets be applied to the payment of the firm-creditors before resort is had by such creditors to the individual assets. An individual creditor of one partner cannot acquire by purchase under his execution any right in chattels of the partnership, except to have an account and possess himself of what interest shall be found remaining to his debtor after settlement of the partnership affairs, and payment of all the joint debts. (Garbetter *a.* Veole, 5 *Ad. & Ellis* [5 *Queen's Bench R.*], *N. S.*, 408; Burton *a.* Green, 3 *Car. & Payne*, and cases in notes; Walsh *a.* Adams, 2 *Den.*, 128.)

This is all the right an individual partner's creditor can acquire in the firm-property. Surely the individual partner himself has no higher right. Our law does not contemplate that a debtor shall have title to chattels which his creditor may not sell on execution. During the existence of the firm each part-

ner, in the ordinary course of business and as agent of the joint concern, may sell the joint property and convert it into money or other property for the use of the firm, and he may therewith pay the debts of the concern; but this is the whole extent of his power. He cannot lawfully step aside from the ordinary course of business, and assign the partnership effects to a trustee even for the payment of the partnership debts, giving preference. (Havens *a.* Hussey, 5 *Paige*, 31; Stevens *a.* Brown, 9 *Upper Canada Law Jour., Ch.*, 110.)

While the partnership continues, no individual partner can lawfully divert the property, or any part of it, from the purposes of the copartnership; nor can he, as we have seen, lawfully apply it even to those purposes, except in the ordinary and usual course of the business, so that his act may be imputable to the partnership itself, acting by one of its members as its agent. It is not easy to find in the reason of things an authority in one partner acting on his own motion, and without the consent of his fellows to transfer the whole estate and effects of the partnership to one favored creditor in payment of his demand, thereby virtually terminating the business and leaving all other creditors unpaid. If this be a lawful exercise of one partner's *jus disponendi*, as supposed by the chancellor in Egberts *a.* Wood (3 *Paige*, 517), the privilege is fraught with incalculable dangers, and the decision of the question whether it exists had best be deferred until a necessity for its decision shall arise. No such necessity exists in this case. Here the partnership had been dissolved by the death of one partner. The choses in action certainly constituted a trust-fund for the payment of debts, and it seems to me that the stock in trade and lease were equally subject to that trust. The question, then, is, had the survivor power to exercise a partiality in the performance of this trust, or was he bound to administer the property *pro rata?* I will not deny that all the partners of a joint concern have together the entire title and absolute right of property. Having therefore the entire and uncontrolled *jus disponendi*, it follows that, in the absence of fraud, any one of them, pursuing the usual course of business, may dispose of the partnership effects; and the concurrent act of all the partners, though entirely outside of the ordinary range of partnership business, may actually extinguish the whole joint interest.

(Dimon *a.* Hazard, *Ct. of Appeals*, March, 1865. Reported in the *Tribune.*)

But a dissolution by the death of a partner gives rise to a very different state of things. The partnership is at an end, consequently all powers which the survivor once had, founded on the mere existence of that relation, must cease. The deceased had in his lifetime power to concur in giving preferences; but this power is by express statute denied to executors. The survivors' right to the copartnership property may be diminished, but surely it cannot be increased by the dissolution. Upon what principle, then, is it that he is claimed to have a right to give preferences? Manifestly he cannot do so in respect to his deceased copartners' share in the chattel property of the firm. It seems to me equally manifest that he cannot in respect to the choses in action; for here the equitable title to the deceased partner's share is in his personal representatives, and he is forbidden to give preferences.

In truth, the only ground on which any authority at all over the partnership assets can fairly be claimed for the surviving partner, before the payment of debts is, that the legal entity which owned the property having ceased to exist, the surviving partner occupies an attitude which makes him the fittest administrator of the fund. If allowed to assume this duty, it must be as trustee for all parties in interest, and he should not give preference.

As the legal title to choses in action survives, the surviving partner may collect them; as the legal joint liability survives, the copartnership creditors have their remedy by judgment and execution at law against the survivor.

In this way preference may be acquired at law by the creditors who are most vigilant, but there is a means of preventing injustice from that source. Any creditor who apprehends loss of his demands by such means may go into equity and obtain an equal distribution. This is usually done through the agency of the deceased partner's personal representatives. (Payne *a.* Hornley, 27 *Law Journal, Ch.*, 689; 4 *London Jurist, N. S.*, 446.) But the right of the creditor to proceed directly in his own behalf is indisputable. (Brett *a.* Beckwith, 26 *Law Journal, Ch.*, 130; 3 *London Jurist, N. S.*, 32, 33; see also *Story on Partnership.*)

Learned judges have confessed themselves unable to define the precise quality of a surviving partner's interest in the assets of the firm. (7 *Paige*, 34.) But the decision is fairly established as the law at this day, that on such a dissolution the assets are, in the first instance, applicable to the payment of the copartnership debts; and, at the instance of any party in interest, equity will restrain any attempt to divert them from that object. (Newell *a.* Townsend, 6 *Simons*, 419.) If the surviving partner is not a trustee for this purpose, he cannot fairly be considered as having any other authority; and if he be such trustee, then surely, like all other trustees, and especially since the Revised Statutes of 1830 have forbidden the application of the deceased partner's share in any other way, he is bound to distribute *pro rata*, according to the maxim that equality is equity. Upon the whole, I cannot resist the conclusion that the bill of sale of the goods, and the transfer of the lease and sublease was, even in respect to the technical share of the surviving partner, an unauthorized preference, and void as against the copartnership creditors.

If this general objection to the transfer of the stock in trade be not maintainable, still, upon settled principles, the transfer was unauthorized and a fraud upon creditors. It has been thought that one partner might sell, deliver, or assign the whole partnership stock directly to a creditor, in payment of his demand. But it is clear that he has no right to transfer the whole property to a trustee to sell the same for the payment of the debts. This is upon the principle *delegatus non protest delegare*. Each partner is by the agreement of the partnership impliedly constituted agent of the firm, with full authority to sell and pay debts in the usual way. Delivering the property to the creditor is merely doing directly what he had power to do circuitously. So in Egberts *a.* Wood (3 *Paige*, 517), the chancellor decided that one partner might make a valid assignment of partnership effects, and directly to the creditor in payment of his demand, though the effect of such assignment was to give a preference to one set of creditors over another. But in Havens *a.* Hussey (5 *Ib.*, 30) the same learned jurist decided that one partner could not assign the goods to a trustee for this purpose. Now, according to the answers of the defendants, the goods in question were not delivered to Hatfield

& Marshall in payment or on account of their demands. On the contrary, they were appointed agents or trustees of the co-partnership to manage the goods according to their discretion, to sell them and to apply what might be realized from such sales in satisfaction of their respective demands. Surely this is a transfer of the partner's power and duties in respect to the administration of the firm-estate to third persons. It is precisely equivalent in its nature and consequences to a transfer to a trustee or agent for like purposes. It is therefore void.

The judge at the special term does not seem to have arrived at any different conclusion. His decision is merely that the goods "cannot be reached in this action." The justice of the plaintiffs' claim, and the injustice of placing these goods beyond the reach of process on their judgment at law, is not denied; but from some reason of a formal or technical nature, which is not disclosed, this action is deemed an inapplicable remedy. This is not apparent to me. The plaintiffs were co-partnership creditors; they proceeded to judgment at law in the only known form—*i. e.*, against the surviving partner. Before the judgment could be obtained, the surviving partner and the defendants Hatfield & Marshall had made away with the property, so that it could not be reached by execution. The plaintiffs exhausted legal diligence against the surviving partner by issuing executions into the county of his residence, which were returned unsatisfied, and this gave them a right to proceed in equity against the property of their debtors of every description. (3 *Rev. Stat.*, 5 ed., 264, § 43.) It is familiar practice to include in such action as defendants all persons who may have co-operated with the debtor in defeating the legal remedies of the creditor. Besides, according to the principle before referred to, those plaintiffs as creditors of the dissolved partnership had a right to the aid of equity in enforcing a proper distribution of the firm assets. It may possibly be that, as matter of form in this aspect of the action, there should have been an administrator of Joseph Addison, and he should have been made a defendant. Perhaps, also, the other creditors, if any there be, of Addison Brothers, ought in some form to have been parties; but if this be so, it is not a ground for denying relief or dismissing the action. Under the former practice in chancery it was firmly established that the bill should not be

dismissed for want of parties, especially if the objection was not taken by demurrer or in the answer.

The settled practice was to direct the cause to stand over, to the end that the requisite parties might be brought in by amendment or supplemental bill. The Code has adopted this practice, and made it imperative upon the courts. Section 144, subd. 4, provides that for a defect of parties apparent on the face of the complaint the defendant may demur. Section 147 provides that if the objection do not appear on the face of the complaint, it may be taken by answer; and the next section provides that if not taken either by demurrer or answer, the defendant shall be deemed to have waived it.

Consequently there was no fatal or incurable defect of parties. Whether or not the legal diligence of the plaintiffs entitled them to a preference, leaving the surplus for distribution amongst the other creditors of Addison Brothers, need not now be decided. Perhaps on a full investigation there may be no other creditors, or the assets may prove sufficient to pay all the debts.

The remaining question is, whether Samuel D. Addison's gift of his patrimonial estate to his wife is sustainable. 3 Rev. Stat., 5 ed., 224, § 1, declares that every conveyance of any interest in lands, made with intent to hinder, delay, or defraud creditors or other persons of their lawful demands, shall, as against the person so hindered, delayed, or defrauded, be void. This is a re-enactment of an ancient English statute, and is merely declaratory of the common law. (Hamilton *a.* Russell, 1 *Cranch*, 316.)

It was determined by the courts that indebtedness of a grantor, at the time of a voluntary conveyance founded on the consideration of natural love and affection, is not conclusive evidence of fraud in such conveyance. (Jackson *a.* Seward, 8 *Cow.*, 406, last point in Syllabus.) In Hinde's Lessee *a.* Longworth (11 *Wheat.*, 213) it is said that "the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was at the time in prosperous circumstances and unembarrassed." The 4th section of this same title of the Revised Statutes adopted these decisions. (See Revisers' note, 3 *Rev. Stat.*, 2 ed., 658.) But the absence of a valuable consideration, and the fact of the grantor's being

deeply indebted at the time of the conveyance, has always been deemed to raise so strong a presumption of the fraudulent intent that, without some explanatory circumstances—as, for instance, such as are referred to in the case cited from Wheaton's Reports—the transaction will be deemed void as against subsequent creditors. (Wadsworth *a.* Havens, 3 *Wend.*, 412.) That subsequent creditors are within the words of the statute, as well as within the mischiefs it was designed to suppress, was decided by HARDWICKE, in Taylor *a.* Jones (2 *Atk.*, 601), and his decision was approved by Chancellor KENT, in Reade *a.* Livingston (3 *Johns. Ch.*, 481.) He notices the distinction between creditors existing at the time of the conveyance and subsequent creditors. From the mere fact of the gift being voluntary and without a valuable consideration, fraud may be an inference of law as to the former; but as to subsequent debts there is no such necessary legal presumption, and there must be fraud in fact. He thus defines the requisite proof of such fraud in fact: "The indebtedness at the time, though not amounting to insolvency, must be such as to warrant the conclusion." In another place he says: "Subsequent creditors would be required to go so far, and only so far in showing debts, as would be sufficient to raise a reasonable presumption of a fraudulent intent." These principles have been reiterated in the adjudged cases times without number. They are the conclusions of common sense upon a pure common-law question. If a trader, deeply in debt, not proven to have had at any time property sufficient to pay his outstanding liabilities, without any special reason or present particular inducement, makes a gift of his real estate to his wife or child, what can be supposed, at the very best, but that his motive was to cast upon his creditors, existing and subsequent, all the risk of his trade, and to preserve his capital for the benefit of himself and his family. This is a fraudulent act. (Twyne's Case, 3 *Coke*, 83.) In the recent case of Carpenter *a.* Roe (6 *Seld.*, 227), Judge GARDINER thus delivers the opinion of the whole court: "To avoid the conveyance and trust in favor of his wife, it is not necessary that the debtor should be insolvent, or believe himself to be so, when they were executed or created. It was sufficient that he was indebted, and that insolvency would be the inevitable or probable result of a want of success in the business in which he was engaged. He could

not legally and honestly in this manner provide for himself and his family, and cast upon his creditors the hazard of his speculations." After such a lucid exposition by our highest tribunal, it cannot be profitable to enlarge upon this topic. Such is the rule of law; now let us recur to the facts.

The plaintiffs brought the case distinctly within the rule by alleging that a very large indebtedness existed at the time of the gift, and that thence until the failure such indebtedness was not diminished. The indebtedness is admitted, and the continuance of debt until the failure is admitted. That there was any reduction of its gross amount is not pretended in the answer, nor is there in the evidence the slightest color for a surmise that it would have been reduced. On the contrary, the loans obtained from Hatfield & Marshall after the gift in question, were obtained, not to pay debts with, but to increase the business. The answers assert that the debts existing at the time of the gift were paid. This is an affirmative alleged by way of avoidance. The burden of proving it devolved on the defendants. They have offered no evidence whatever in support of it. But even if such were the fact, it would not avail to repel the presumption of fraudulent intent. From the admissions in the answers, it must be understood that the debt of this firm, like the liabilities of most mercantile concerns, constituted an unbroken stream of equal volume, from the time of the gift to the time of the failure. The stream continued the same alike in all essentials, though the particles of which it was composed were constantly changing. Such an allegation is frivolous in point of reason, and, according to all authorities, totally unavailing in point of law. The authorities are collected, and their result stated with admirable exactness by the learned editors of the American Leading Cases. (1 *Hare & Wallace*, 4 ed., 40, 41.)

The allegation that the firm or the partners had at the time of the gift sufficient money to pay their debts, independently of this real estate, was material and relevant, and, if proven, might have sanctioned the gift. But this also was an affirmative, and the burden of proving it devolved upon the defendants. No evidence whatever was offered in support of it. Though not necessary to the condemnation of this transaction, it may properly be added that all reasonable inferences from the circumstances before the court are against the allegation. The

plaintiffs were not bound by law to disprove this averment, and indeed, it would be in the highest degree unreasonable to exact from them proof of such a negative. The proof was most accessible to the defendants; the plaintiff had very slender means, if any, to ascertain the facts.

The conveyance was a mere gift; it was called for by no special exigency; it was made by one in trade heavily indebted, and who continued so in debt until he sank into disastrous insolvency. The grantor contracted the debt in question by means of a false and fraudulent representation that no such gift had been made, and soon afterwards failed, transferring the very property obtained by his false and fraudulent representations to the same member of his family who was his agent and co-operator in making this gift. I do not assert that fraud or not is a question of law. I admit that, in its very nature, it is a question of fact. But on such a state of facts, wholly unexplained and uncontradicted by any proof whatever, the fraudulent intent alleged in respect to this gift is an irresistible inference. (Vance *a.* Phillips, 6 *Hill*, 435, 436.) These lots lie in the city of New York; the plaintiffs' judgments are both liens upon them. The conveyance to Hatfield and Mrs. Addison should have been declared fraudulent and void as against the plaintiffs. Their judgment at law might then be executed upon them, or this court might direct a sale by a receiver, requiring all parties to join in the conveyances, and apply the proceeds among the creditors according to law. (Per Tracy, Senator, McElwain *a.* Willis, 9 *Wend.*, 567, 568.)

The appeals of the defendants should be dismissed, with costs, and a new trial directed on the plaintiffs' appeal.

WILKINS *a.* EARLE.

New York Superior Court; General Term, June, 1865.

INNKEEPERS' LIABILITY.—NOTICE OF PROPERTY DEPOSITED.

An innkeeper is not liable to his guest for the loss of money, brought into the inn by the latter, beyond such amount as is necessary for his travelling expenses, unless a special contract is shown, or an actual delivery to the innkeeper or his servant, with notice of the amount deposited, is shown.

The liability of the innkeeper for baggage is analogous to that of common carriers of passengers.

Where the keeper of a hotel kept notices posted in his hotel cautioning guests against leaving money or valuables in their rooms, as the proprietors would not be responsible therefor, and requiring packages of value to be properly labelled, and deposited in the safe, in the office; and the plaintiff delivered to their clerk a package containing twenty thousand dollars, in money marked only with his name, and being asked by the clerk what it contained, answered "money," without stating the amount,—*Held*, that the innkeepers were not liable for the embezzlement of it by the clerk, except for such amount as was found by the jury to be necessary for the guest's travelling expenses. The guest was guilty of negligence in not distinctly describing or labelling the package, with a statement of the value.

The notice given by a guest should be not only of the kind of property, but of its value.

An innkeeper is responsible for all moneys deposited with him, without reference to any negligence. (Per MCCUNN, J., dissenting.)

This was an action brought by William T. Wilkins against William P. Earle and William A. Earle, to recover a sum of money which the plaintiff, when a guest in the defendants' hotel, had deposited in their safe, and which had been embezzled by their clerk.

The facts appeared to be as follows:

On the 20th of April, 1863, Mr. Wilkins, the plaintiff, came to this city and went to Earle's Hotel; he registered his name and asked for a room, and was told that the house was crowded, and that he could get a bed, but not a single room, and he was assigned to room No. 124; in the room was the following notice:

"Guests are cautioned against leaving money or valuables in their rooms, as the proprietors will not be responsible for them. All packages of value should be properly labelled and deposited in an iron safe, which is kept in the office for that purpose.

"Guests will please comply with the above requests, or the proprietors are relieved, in case of loss, from all responsibility."

After said notice followed a copy of the Law of 1855, relative to innkeepers.

On the same evening, the plaintiff handed a package to a clerk in the office, named Howard. Howard picked the package up, and asked Wilkins what it was. Wilkins said it was money, which he wished deposited in the safe.

The clerk then, in plaintiff's presence, procured the key of the safe, opened it, deposited the package, and locked it. Plaintiff asked him for a check. The clerk said they gave no checks, but required guests to identify their packages, and assured plaintiff no accident had ever occurred. One of the proprietors was in the office at the time, and plaintiff thinks Howard obtained the key from him. Early the next morning, before Mr. Earle was up, Howard went to Earle's room, and asked him for the key of the safe, which was given. Afterwards, when Mr. Earle came down, he found the safe locked, and, as he alleges, Howard had absconded, and had taken the money of plaintiff with him, together with other moneys deposited in the safe.

The amount of money contained in the plaintiff's package was twenty thousand dollars. Under the instructions of the court, the jury found that one thousand dollars was a reasonable sum for the plaintiff to have had with him, as travelling expenses, but found also a general verdict for the plaintiff for the full amount claimed.

The cause now came before the court, at general term, upon exceptions taken at the trial.

Barney, Butler & Parsons, and *E. Pierrepont*, for plaintiff.

John McKeon, Fred. Smyth, and *W. F. Allen*, for defendants.

By the Court.*—Robertson, Ch. J.—The liability of keepers of inns for property, which travellers, who are guests therein, bring with them, is as old as the existence of inns in England. (Hollingshed's Chronicle, cited in Edw. on Bailment, *App.*, 620.) The whole doctrine in relation thereto is summarily stated in the recital of an ancient original writ, entered in the Register of Writs (f. 105), among writs of trespass (on the case), and set out at length in Fitzherbert's Natura Brevium (94 a. b.). Such writ forms the groundwork of the early decision in Calye's case (8 *Rep.*, 32), in which the general principles embraced in such doctrine are evolved from such writ; all of which have some bearing on this case, and are in substance as follows:

1. The place of loss is required to be an inn (*commune hospitium*), which is defined to be "a house where the traveller is furnished with every thing he has occasion for on the way" (Thompson *a.* Lacy, 3 *B. & A.*, 283); the keeper of it not being bound to furnish any thing else (Fell *a.* Knight, 8 *M. & W.*, 276); such as a place of sale for goods (Burgess *a.* Clements, 4 *M. & S.*, 306); or to receive any one but travellers (Rex *a.* Luellin, 12 *Mod.*, 445), or any thing but what is usually brought with, or carried by, them (Broadwood *a.* Granara, 10 *Exch.*, 417; *S. C.*, 24 *Law J.* [*Exch.*], 1). Although he is liable to an action for not receiving them (Com. Dig. action on the case; Rex *a.* Ivens, 7 *C. & P.*, 213; Bacon's Abr. Inns Court, *C.*, 3; Thompson *a.* Lacy, 3 *B. & A.*, 283), as well apparently as indictment (Year Book, 5 *Edw. IV.*, Easter T., fol. 10, by Hoedon, J.; 1 *C. & K.*, 404; *Edw. on Bailm.*, 408); and he cannot make any terms or conditions with his guests (6 *T. R.*, 17, per Ld. Kenyon; Cole *a.* Goodwin, 19 *Wend.*, 269, per Cowen, J.). A house becomes an inn by the mere custom of receiving persons transiently as guests, without a definite agreement as to time (Wintermunte *a.* Clarke, 5 *Sandf.*, 242; Taylor *a.* Monnot, 4 *Duer*, 116). But a mere restaurant or place of eating is not one (Carpenter *a.* Taylor, 1 *Hilt.*, 193).

2. The guest must be a traveller (1 *Roll. Abr.*, 394; 2 *Brownl.*, 254; Rex *a.* Luellin, 12 *Mod.*, 445; Ingolsbee *a.* Wood, 36 *Barb.*, 452; Bacon's Abr. Inns, *C.*, 5; Parkhurst *a.* Foster, *Salk.*, 387); the time of his stopping is, however, immaterial, whether it be

* Present, Robertson, Ch. J., Garvin and McCunn, JJ.

of some duration or for mere refreshment (Barnell *a.* Mellor, 5 *T. R.*, 273; Carpenter *a.* Taylor, 1 *Hilt.*, 193; McDonald *a.* Egerton, 5 *Barb.*, 560).

3. The loss or injury for which the innkeeper is liable is, that of or to goods and chattels (*bona et catalla*) placed within the inclosure and shelter of the inn and its appurtenances (*infra hospitium*), as laid down in the Year Books (11 *Hen. IV.*, 45 a. b.; 22 *Hen. VI.*, 21 b.; 42 *Eliz.*, 3, 11 a. b.; 42 *Ap.*, pl. 1). Although animals put out to pasture at the guest's request are not so (1 *Roll. Abr.*, 34; 2 *Brownl.*, 255; Hawley *a.* Smith, 25 *Wend.*, 642); yet vehicles left in the street by the innkeeper's servant (Jones *a.* Tyler, 1 *Ad. & El.*, 522), or a wagon-load of goods in like manner placed in an uninclosed shed (Piper *a.* Manny, 21 *Wend.*, 282), or a sleigh-load of grain in an outhouse where such articles were usually stored (Clute *a.* Wiggins, 14 *J. R.*, 175), and goods placed in a "commercial" room (Richmond *a.* Smith, 8 *B. & C.*, 9), were held to be so.

4. The person by whom the articles were taken or the mode of loss, is immaterial (Year Book, 22 *Hen. VI.*, 38, pl. 8; *Roll. Abr.*, tit. *Hostler*, 7; Clute *a.* Wiggins, *ubi sup.*; Gile *a.* Libby, 36 *Barb.*, 70; 2 *Kent's Com.*, 593; *Story's Com.*, 306, §§ 470, 479; *Bell's Com.*, 402, 403 (4th ed.), 496 (5th ed.); *Edw. on Bailm.*, 400, 403, 407; *Jones on Bailm.*, 94); unless such person were the servant or companion of the guest (*Cro. Eliz.*, 285; Burgess *a.* Clements, *ubi sup.*; Fowler *a.* Dorlan, 24 *Barb.*, 384); or the negligence of the guest contributed to the loss (10 *Eliz.*, *Dyer*, 266; Burgess *a.* Clements, *ut ante*; Farnsworth *a.* Parkwood, 1 *Stark.*, 249).

5. For clothing, ornaments of the person, including a reasonable amount of jewelry, generally worn by travellers, which embraces a gold watch and chain, gold pen and pencil-case (Giles *a.* Libby, *ubi sup.*), and for sufficient money to pay the travelling and other reasonable daily expenses of the guest, the innkeeper is held liable (Taylor *a.* Monnot and Giles *a.* Libby, *ubi sup.*; Van Wyck *a.* Howard, 12 *How. Pr.*, 197; Stanton *a.* Leland, 4 *E. D. Smith*, 88).

Beyond that, unless the innkeeper has voluntarily and knowingly undertaken the custody or care of property, no case has adjudged his liability; some elementary writers and some dicta

make him liable for every thing a traveller chooses to bring into an inn. Judge Story, in his Commentaries, states the liability in general terms (p. 306, § 470); Chancellor Kent, in his, extends it to "all the movable goods, chattels, and moneys of the guest which are within the inn" (vol. ii., 593). In Calye's case (*ubi supra*) it is said to embrace even documents relating to the title of lands and choses in action; in Kent *a.* Shuckard (2 *B. & Ad.*, 803), the only question raised was, whether the innkeeper was liable for money as well as other chattels, and it was held that he was; the amount lost in that case was only fifty pounds, and was stated to have been kept to meet daily expenses only. In Quinten *a.* Courtney (1 *Hay.* [N. C.] 41), the amount was only two hundred dollars; and the case of Fowler *a.* Dorlon, in our own court (24 *Barb.*, 384), is in direct conflict with the principle held in that case. In the Berkshire Woollen Company *a.* Proctor (7 *Cush.*, 417), although the money lost was more than sufficient to defray the expenses of the particular guest in whose charge it was, it was the property of another person, and left with such guest to pay to others who were guests at the same inn, or defray their expenses there, they being witnesses in a lawsuit, whose management was the errand of such guest at such inn; and all such circumstances are dwelt upon in the opinion delivered in that case. Nothing was said, except in general terms, in Purvis *a.* Coleman (21 *N. Y.*, 111), about the liability of an innkeeper who had not given any notice to his guests of means provided for the safe-keeping of their property. In that case, he was held to be exempt from liability for a loss, in consequence of the failure of the guest to avail himself of such means after notice. In the case of Giles *a.* Libby (*ubi supra*), it was held that ornaments or money usually carried about the person by a prudent man, did not come within the provisions of the statute of 1855 (ch. 421), exempting innkeepers from liability for goods of a guest not deposited in a place of safe-keeping provided by them, after notice of such provision, as the money lost ($25) was held not to be more than a prudent person might carry about with him.

Being thus at sea in regard to direct decisions as to the extent of an innkeeper's liability for the goods of his guest, we can only have recourse to indirect recognitions of the true doctrine in decided cases, to analogies to the liability of other per-

sons, and to principles drawn from the origin and nature of the legal relation of the innkeeper and his guests.

It has always been conceded that, upon all the goods for whose safe-keeping he is liable, an innkeeper has a lien for the keeping of his guest (Grinnell *a.* Cook, 3 *Hill*, 485; Ingoldsbee *a.* Wood, *ubi supra*), even when they are not the property of his guest. (Robinson *a.* Walter, 3 *Bulstr.*, 269; S. C., *Poph.*, 127.) But in the case of Broadwood *a.* Granara (10 *Exch.*, 417; S. C., 1 *Jurist, N. S.*, 19; 24 *L. J.* [*Exch.*, 1]), it was held that an innkeeper was not bound to receive a piano with a guest, and therefore had no lien upon it. Counsel in that case said, in argument, that he was "only compellable to take in such articles as both in nature and quality are reasonable for a traveller;" to which PARKE, B., assented, and added: "He is bound to take in those things with which a person ordinarily travels, ... to receive all goods which by his public profession he engages to receive;" but put the pertinent interrogatory, "Is he bound to take in articles of extraordinary bulk?" to which I would add, "or value?" the principle being precisely the same.

The origin of the liability of an innkeeper to his guest for the loss of the latter's property while in his inn, the principle of policy applicable to it, and, indeed, the whole relation, are so analogous to those applicable to a common carrier and a passenger transported by him, in relation to what is called his "baggage," that the extent and conditions of their liability have been held to be the same. (Orange County Bank *a.* Brown, 9 *Wend.*, 85; *Jones on Bailment*, 103; *Edwards on Bailment*, 414.) The definite term baggage, it is true, has been applied only to the property of the passenger carried about with him for travelling purposes, for which the carrier is liable; and probably if the same term had been applied, in legal phraseology, to the goods of a guest at an inn, for whose safe-keeping an innkeeper was liable, the question of liability would have been long since settled. The same obligation is imposed upon both, upon account of the public character of their occupation of receiving travellers, by the carrier as passengers and by the innkeeper as guests, which involves also the necessity of receiving their travelling equipments, although the carrier escapes liability, if they are not delivered directly into his

custody. (Tower *a.* Utica & Schenectady R. R. Co., 7 *Hill*, 47; Cohen *a.* Frost, 2 *Duer*, 335.) Generally, neither receives separate compensation for care in regard to such baggage (Powell *a.* Meyers, 26 *Wend.*, 591), except when a carrier receives compensation for it as freight. The same danger, in both cases, of fraud or carelessness on the part of the innkeeper and carrier, or their servants, and the impossibility of the constant attention of the owner of the goods to their safe-keeping, is the ground of liability. Although the carrier has been held to be exempt from liability for money destined to meet travelling expenses (Orange Co. Bank, *a.* Brown, 9 *Ib.*, 85), yet this rule does not prevail when travelling abroad (Duffy *a.* Thompson, 4 *E. D. Smith*, 178); in which case, even a gun carried in a trunk and the tools of a trade have been included. (Davis *a.* Cayuga & Susquehanna R. R. Co., 10 *How. Pr.*, 330.) Articles usually worn about the person, such as a watch and articles of jewelry, are included in such liability, if in a trunk. (McCormick *a.* Hudson R. R. Co., 4 *E. D. Smith*, 181.) And although it is laid down in general terms, that every thing destined for the personal use, convenience, and even instruction and amusement of a passenger, is included in the baggage for whose safe transportation a carrier is liable (Hawkins *a.* Hoffman, 6 *Hill*, 586), yet the extent of his liability is very much narrowed; it does not embrace merchandise (Pardee *a.* Drew, 25 *Wend.*, 459), or samples of it (Hawkins *a.* Hoffman, *ubi supra*), or boxes of jewelry for sale (Richards *a.* Westcott, 2 *Bosw.*, 589), or silver ware (Bell *a.* Drew, 4 *E. D. Smith*, 59), or presents for friends (*Ib.*), or regalia or jewels of a society (Nevins *a.* Bay State Steamboat Company, 4 *Bosw.*, 225); and it is fully settled that the mere acceptance of a trunk or baggage, containing what is not for personal use, does not bind the carrier, without knowledge of such contents. (Richards *a.* Westcott, *ubi supra.*) Of course, different rules prevail, in regard to a common carrier of mere freight (Batson *a.* Donovan, 4 *B. & A.*, 21; Miles *a.* Cattle, 6 *Bing.*, 743), where goods of all kinds and of any amount of value are received, and a distinct compensation is paid for carrying them. Deceit practised in regard to goods carried as baggage relieves the carrier from liability, which it would not, if carried as freight. (Richards *a.* Westcott, *ubi supra.*) The presumption in regard to articles brought by

travellers to an inn, as well as to the depot of a carrier for transportation, when contained in trunks or packages and of unknown value, must be that they consist merely of the ordinary accompaniments of a traveller when travelling, and not articles or securities for commercial or other purposes; if they are more, both the innkeeper and the carrier are at least entitled to notice of their value and character beyond that extent.

Previous to the introduction of the law allowing parties to be witnesses for themselves, travellers, in case of a loss at an inn, of their personal effects, were allowed to testify to the contents of their trunks (Taylor *a.* Monnot, *ubi supra*); and this was placed on the ground of the necessity of the case, counterbalancing the consideration of any danger arising therefrom by the fact that the loser could only recover to the extent of the value of what usually is carried by travellers. But the evil arising from such admission of testimony, which would be slight when confined within such limit, would become gigantic if a traveller could testify to the loss of articles of indefinite value, as to which there would be no power of contradiction.

It is possible that the liability of an innkeeper may be divided into two elements, as well as that of a carrier (Dorr *a.* N. J. Steam Navigation Co., 4 *Sandf.*, 136); and that he may, under that which makes him liable as a bailee, be so liable for goods received by him into his inn, when, either from their appearance or actual notice, he knows they are not the usual accompaniments of a traveller as such, and assents to their reception; but still such notice would be requisite.

It is very plain that it would be highly unjust, and not founded upon any principle upon which an innkeeper's liability rests, for a traveller to be able to bring into an inn unobserved any amount of valuables without notice to the innkeeper, and hold him responsible for their safe-keeping. There must be some restriction or qualification of such liability, if it exists; and that must be a warning to the innkeeper of the extra risk he is about to run. It is not very material in such cases whether such notice is made a condition of such liability, or the want of it is made such negligence on the part of the traveller as to be assumed to have contributed to the loss, and thereby exonerate the innkeeper. (Mateer *a.*

Brown, 1 *Calif.*, 225; Fowler *a.* Dorlon, 24 *Barb.*, 384.) In the case last cited (Fowler *a.* Dorlon), it was held to be such negligence in the traveller, who delivered his valise containing money to a servant of the innkeeper, not to have informed him of the fact, as to deprive him of the right of recovery for its loss. In this case, therefore, unless a special contract was made by the delivery by the plaintiff of the package of valuables in question to the clerk of the defendants on the occasion proved, the question of notice will be essential. If no special contract was made, and no notice given, the liability of the defendants would depend upon precisely the same principles as if the package in question had been taken from the plaintiff's room in the inn of the defendants.

If any special contract was entered into by the transaction between the plaintiff and the clerk, on the occasion in question of the delivery of the package to the latter, it could only have been by virtue of some authority given to the latter to make such contract. The safe in which the plaintiff requested such package to be deposited was one provided by the defendants, pursuant to the provisions of the statute of 1855, already referred to, and such clerk was not authorized to make any other contract except that to be implied from the mere receipt and deposit of the package in such safe, exactly in the condition in which it was. No authority was proved or found to have been given to him, to agree to become responsible for parcels of unknown value. The notice posted in the hotel of the defendants, required a package to be deposited to be "properly labelled," and the clerk informed the plaintiff "that they made their guests describe the property before redelivery." It was, therefore, only for packages properly labelled the defendants undertook to be responsible; and it was only of such property as could be described, their clerk undertook to take care. If the defendants were not responsible for the contents of such package before it was deposited in such safe, while in their hotel, I do not think the clerk who received it was authorized to make, or did make on their behalf, a special contract for its safe-keeping at all hazards, especially when without any compensation commensurate with the risk.

This case, therefore, resolves itself into the question, whether the plaintiff, by depositing in the safe of the defendants the

package which he delivered to their clerk, under the circumstances under which he so deposited it, and with no more notice of its value than was given in his conversation with such clerk at the time of such delivery, was not guilty of such negligence, or did not so violate the implied condition of the liability of the defendants, as to exempt them entirely therefrom. A notice, to be sufficient to relieve the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value. Otherwise, if the innkeeper was upon other principles not bound to accept its custody, he could not fix his compensation for the voluntary risk assumed by him, and would not increase his vigilance and precautions to prevent a loss. The package was sealed up, and marked only with the plaintiff's name, which furnished no information. The plaintiff, upon being asked what it was, answered merely "money," which is equally unsatisfactory and indefinite. Besides, the defendants notified him that, if their safe was to be used as a depository, packages deposited in it were to be "properly labelled," which, of course, involved a description of their contents or a statement of their value. The mere information that a package contained "money," without knowledge of the amount, would not necessarily arouse the increased vigilance of the defendants. Indeed, the whole conduct of the plaintiff, including his mode of carrying the property in question, the time and place selected for changing the envelope the sealing up with no external mark but his name, his curt reply to the question "What it was?" indicate rather a reluctance to make known its value. Such acts were deficient in candor to the defendants, whose safe he chose to make the depository of his capital in business, instead of the vaults of a bank. True, he might have lost such package, even if its contents had been disclosed, and yet the defendants might have had their attention attracted to it if it had been properly labelled. By not giving proper notice, the plaintiff must be presumed to have trusted to the safety of his place of deposit and the honesty of the clerk, rather than the responsibility of the defendants.

I am, therefore, of opinion, the defendants are only liable for the amount lost by the plaintiff equal to his travelling expenses, as found by the jury; the general verdict, which is con-

trolled by such special finding, must be reduced to that sum, and the exceptions as to the amount beyond that sustained; the other exceptions, being untenable, must be overruled and judgment rendered for the amount so found.

GARVIN, J., concurred.

MCCUNN, J., dissenting.—I confess to having considered this case anxiously, and I may say, with more than ordinary attention and research, for the reason that the chief-justice has seriously changed his first views in the premises; and, also, from having great reluctance in putting forward my views in opposition to two of the learned justices of this court; yet I have been unable to bring my mind to the same conclusions as those recently entertained and promulgated as the opinion of the court in this case at general term.

There is but one important question in this case, and that question is, whether Mr. Earle, as innkeeper, is liable, under the circumstances, for the large amount of money deposited with him by plaintiff?

[After stating the facts of the case his honor continued as follows:]

The simple and only question in the case is whether, under the circumstances, Mr. Earle, the defendant, is liable in law as innkeeper to the plaintiff for the entire amount of $20,000, so received by him and deposited in his safe, or only liable for enough to cover travelling expenses—to wit, $1,000? I am clearly of opinion that he is liable to the plaintiff to the full extent of $20,000, with interest; and my conclusions to that effect have been strengthened and confirmed by the fact that all the cases in the English and American books, for nearly the last three hundred years, go, beyond a doubt, to establish the fact of his entire liability, for not one solitary case can be found sustaining the theory of a limited responsibility.

Indeed, the learned chief-justice admits that all the cases cited in his opinion go to show that, to a certain extent, innkeepers are liable, but says we are at sea about the extent of the liability; and cites a number of cases, all of which, I am

compelled to say, are unlike the one at bar. According to my understanding of these cases, the innkeeper is clearly liable; but the chief-justice maintains that none of those cases fixes or limits the extent of the liability. I think they all fix the liability to any amount the traveller may have with him in the inn. It is a well-established principle, that in the amount charged for the keep and board of the traveller, the innkeeper receives the consideration for the safe keeping of his guest, his goods, and his money (2 *Kent's Com.*, 7 ed., 758; Lane *a.* Cotton, 12 *Mod.*, 483, 487; The Berkshire Woollen Co. *a.* Proctor, 7 *Cushing*, 417; Mason *a.* Thompson, 9 *Pick.*, 280; Bennett *a.* Mellor, 5 *Term R.*, 273); and this principle runs through all the cases to the present time.

The common law fixes an implied contract between the innkeeper and his guest. The innkeeper is to entertain and keep safely the guest, his money, and his goods. The traveller, in consideration thereof, is bound to pay the price demanded for such entertainment, and the safe-keeping of himself, his money, and goods; and the goods received at the inn are by law pledged to the innkeeper for the fulfilment of his part of the contract, and it cannot therefore be said there is no consideration passing from the traveller to his host for the risk or liability incurred by the innkeeper.

This has been an undisputed principle of law for hundreds of years past; and the question that now arises is, does the statute of 1855 change this principle? The act simply says, there is to be a safe in this inn, under the absolute, especial, and immediate control of the innkeeper, his agents, and servants, and unless the guest deposits his money in that safe, the innkeeper is not responsible; and the rule of law is clear, that if the guest does deposit his money in that safe, the innkeeper is certainly liable to protect him against the theft of himself or servants. Any other rule of law would place the traveller at the mercy of a dishonest innkeeper and his dishonest servants, without a remedy; and public policy calls for the inflexible enforcement of such a rule of law, although occasionally it may work harshly. It must be conceded, that before the law of 1855 was enacted, if a guest came to an inn, and took to his room $20,000, and the innkeeper's servants or agents broke in and robbed the guest, the innkeeper was held liable, and surely if

the law of 1855 compels the guest to place that money under the absolute and immediate control of the innkeeper and his dishonest servant, he is doubly responsible, because, if this trap of a safe had not been there, the traveller might have protected his money, in his room, with his own means of protection. The act, undoubtedly, was to relieve the innkeeper from responsibility, where the guest was robbed of his money or goods, while they were in the room. I therefore hold, that where the guest complies with the law of 1855, as in this case, the innkeeper should be held to a more strict accountability than he was before the law was passed. This being so, it is quite clear that the same principle that would make him liable for $10 would make him liable for $10,000. If this were not the rule, how absurd it would be to compel a traveller, under the act of 1855, to hand an innkeeper $20,000 for safe-keeping, and have the innkeeper say next morning, that he received that amount from him, put it in his safe, but it was lost through his negligence, and he could only give $1,000 instead of the $20,000. That is precisely this case.

The common law creates the contract between the traveller and his host. The statute of 1855 defines more clearly the duties of the parties; and if the guest neglects to comply with his part of the statute, by placing his money in the safe and it is stolen, it is his loss alone. But if the innkeeper assumes the risk, by taking the money in his safe-keeping, his liability to such guest is rendered positive and certain; and the consideration is the large sum demanded for the guest's keeping, together with the lien the innkeeper has on such money and goods until such keeping is paid.

It is contended for, in the opinion of the court, that it would be unjust for a traveller to bring in any amount of money or valuables to an inn, and, without notice, make the innkeeper liable. The simple answer to that proposition is this: That this is not a case of that kind. Here the innkeeper had the money placed in his safe-keeping, and had sufficient notice of the contents of the package—such a notice as satisfied him—and he thereupon entered into the obligation of taking care of the money for the consideration of the guest stopping at his inn; and the common law says, the defendant shall be responsible for the loss, especially if that loss takes place from the

negligence of servants of the defendant. If this rule was not the proper one, how easily an innkeeper could conspire with his servants and rob his guests; whereas, the innkeeper at all times has a perfect security against his guests, by simply asking the guest what are the contents of the package, and if he finds it too large, by refusing to receive it. The guest, however, has no such safeguard against the dishonesty of innkeepers and their servants, if this old rule of common law is to be abolished.

As to the question of notice, I hold that it is not necessary at common law that the guest should notify the innkeeper of the amount of money. The question of negligence cannot come up, for the innkeeper is liable without reference to any degree of care or negligence on his part. Chancellor Kent holds that it is not necessary to prove negligence in an innkeeper—the innkeeper is liable as an insurer of the property and moneys of his guest, and this liability is founded on the principle of public utility, to which all private considerations ought to yield. (2 *Kent's Com.*, 7 ed., 760, and cases there cited.)

It is, therefore, at common law, unnecessary that the guest should notify the innkeeper of the particular amount of property or money left with him; and it is no argument against the innkeeper's liability to say, that if the guest had notified him of the particular amount of money he was leaving with him, in such a case the innkeeper would have exercised greater care, as the innkeeper is liable without reference to any degree of care or negligence on his part.

The statute of 1855 requires that a safe must be kept in which a guest may deposit his money. This increases public confidence and security to guests; and it must be presumed, therefore, that the Legislature intended that guests would be influenced by this increased confidence, and avail themselves of the additional security. It cannot be justly said, that $3 per day is not adequate to the risk, because if not adequate they must make the contract with the guest for a larger consideration; and second, by analogy to the risk that insurance companies take, the very small premiums they receive, and the enormous losses they frequently sustain, it may be said that the consideration of $3 per day is large. But to return to the question of notice on the part of the guest. The learned

chief-justice, in his able opinion, denies the sufficiency of the notice given by the plaintiff to the defendants of the contents of the package, when it was intrusted to the defendant for deposit in his safe, and says, that "a notice, to be sufficient to release the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value." When the package containing the money was handed to the defendant's agent at the office, to be deposited in the safe, the defendant, by his agent, asked the plaintiff "what it contained?" the plaintiff answered, "Money." This description and notice were then satisfactory to the defendant, and the package was so marked.

The description satisfied defendant then—he asked for no other, but with that description took charge of the "money." I think he should now be estopped from saying the notice was not sufficient; the contrary doctrine would lead to great frauds.

If the notice was insufficient, and was not a satisfactory compliance with the statute on the part of the plaintiff, and did "impute negligence to the plaintiff," then, I am unable to see on what theory the plaintiff could recover any thing at all. I am unable to see why the notice should be insufficient to allow the plaintiff to recover all the money received by the defendant on the notice, but sufficient to allow him to recover a part. If the notice was insufficient under the statute (and if the question of notice is in any way controlling), then the plaintiff should not have recovered any thing; but it being conceded that he should recover at least one thousand dollars and costs, I think from that concession alone it follows he should recover the whole of his loss. I am clear that the notice to the defendant, of the contents of the package intrusted to and received by him, was, under the circumstances of this case, sufficient.

It has been urged by the counsel for the defence, and a conclusion to that effect has been drawn in the leading opinion of the court, that the cause is analogous to that of the common carrier. I do not entertain any such conclusion of the similarity.

Formerly, it was held that a carrier of passengers was not answerable for baggage at all, unless a distinct price was paid

for it. This never was the rule with innkeepers, and the reasoning, both of the statute and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely almost entirely on the good faith of innkeepers; that it would be almost impossible for them, in any case, to make out any proof of fraud or negligence in the innkeepers; and that, therefore, the public good and the safety of our large travelling community require that innkeepers should be held entirely responsible for the safe-keeping of the goods of guests; and the same reasoning would hold them alike responsible for money. Another reason why common carriers are sometimes excused for the loss of large sums of money, when packed in trunks, and so lost, is, that it is not presumed that a traveller would carry large sums of money in trunks, with his clothing, but would rather be presumed to carry such large and valuable sums of money about his person, while travelling; which latter presumption ceases when the traveller arrives at an inn, where the law provides a place of safety for such money, and where the innkeeper is held liable for any loss arising through his neglect.

This much have I reasoned, and said why this defendant should be held responsible for the loss of the money. Now, let us examine the decisions from the time of the earliest cases to the present, on the subject.

One of the earliest decisions we find reported is that of Calye's case, tried in the Queen's Bench, during the reign of Elizabeth (8 *Coke*, 33), and there it is clearly enunciated as law, that the "innkeeper is responsible if the guest is robbed in his house;" and I find, on a careful examination of the English authorities, that such is held to be the invariable rule of law in the courts of that country to this day. In the case of Kent *a.* Shuckard (2 *Barn. & Adolph.*, 803, Lord Tenterden), it was held (all the other judges concurring), that innkeepers were liable for all moneys as well as goods of a guest; and that there was no distinction between money and goods. In the case of Coggs *a.* Barnard (1 *Smith's Lead. Cas.*, 309), it is expressly held that the innkeeper's liability is not restricted to such sums as are required for travelling expenses; and the same rule was held by Holt, Ch. J., in the case of Lane *a.* Cotton (12 *Mod.*, 487), and

the very learned and able Judge COWEN, in the case of Cole *a.* Goodwin (19 *Wend.*, 251), hold a similar doctrine, so that it cannot be said that we are at sea as to the extent of the liability of innkeepers. Since these leading cases, both the English and American cases, adjudicated upon by the most learned of men, all fix the liability of the innkeeper to any sum of money the traveller may have within his possession, and intrust to the innkeeper in the manner before specified.

Indeed, in the case of Piper *a.* Manny (21 *Wend.*, 282), Chief-justice NELSON carried this doctrine so far as to hold that an innkeeper was liable for the safe-keeping of a load of goods belonging to a traveller who stopped at the inn, even though the servant of the inn designate an open space near the highway for the goods to be placed.

In the case of Towson *a.* Havre de Grace Bank (6 *Har. & Johns.*, 47, 63), after stating the position that if A. sends his money by his friend, who is robbed at the inn at which he is a guest, the court says A. shall have the right of action. Now, certainly, this money of a friend was not for travelling expenses, it was simply a part of the money and goods of the guest, whom the innkeeper had undertaken to entertain as his guest, and around whom the great common law of our land throws its ample protection against the frauds of innkeepers; and this safe doctrine is also promulgated in the case of Mason *a.* Thompson (9 *Pick.*, 280).

The case of Bennett *a.* Mellor, herein cited, is a case where a guest left a sleigh-load of wheat in an outer-house belonging to the inn. The wheat was stolen, and the innkeeper was held liable. Certainly the wheat was not travelling expenses! And the like rule was held in case of Hallenbake *a.* Fish (8 *Wend.*, 547). There the innkeeper was held responsible for the loss of a set of harness placed in a barn by the innkeeper's man; and in the case of Jones *a.* Tyler (1 *Adolph. & Ellis*, 522), the innkeeper was held responsible for a gig that was placed in front of the inn on the common highway.

Mr. Justice FLETCHER remarks that the principle contended for, that innkeepers are liable for such sums only as are necessary, and designed for travelling expenses by the guest, is unsupported by any authority whatever, and wholly inconsistent with the principle upon which the liability of innkeepers rests.

And the same rule was held good by Chief-justice BRONSON, in the case of Grinnell *a.* Cook (3 *Hill*, 485), and reiterated in the case of McDonald *a.* Edgerton (5 *Barb.*, 560); and see Bennett *a.* Mellor (5 *Term R.*, 273). And this safe doctrine was reenunciated in the late case of Gile *a.* Libby (36 *Barb.*, 70). In the case of the Woollen Co. *a.* Proctor (7 *Cush.*, 417), where an agent of the company was robbed at the inn of a large amount of money belonging to the company, it was held that a recovery was not limited to travelling expenses; and certainly the case at bar is a much stronger case in favor of the plaintiff than the one last cited, for there the agent was robbed by some outside party, of money not his own; but here the plaintiff was robbed of his own money, by one of the servants of the innkeeper. In North Carolina, too, in the case of Quinten *a.* Courtney (1 *Hayw.*, 41), it appeared that a traveller alighting at an inn, and delivering his saddle-bags, containing a large amount of money, to a servant, did not inform the innkeeper that there was money in the bags;—the money was stolen, and the tavern-keeper was held liable. See also the case of Dwight *a.* Brewster (1 *Pick.*, 50), and Taylor *a.* Monnot (4 *Duer* [in this court], 116), where a similar doctrine is maintained. And Mr. Justice STORY lays down as an elementary principle a doctrine that completely meets this case. He says (at chapter 6, section 481, p. 456, of his Commentaries): "So the innkeeper will be liable for the loss of the money of his guest, stolen from his room, as well as for his goods and chattels; and this liability extends to all the movable goods and money of the guest, placed within the inn, and is not confined to such articles and sums only as are necessary and designed for ordinary travelling expenses of the guest."

But why enumerate cases? the doctrine is as old as our common law. Indeed, to hold a contrary rule, without authority or precedent, is to cast loose from the safe moorings of the old common law, rendered dear to us by the adjudications of the most learned of the bench, for centuries past, both in the old and new world; and I am satisfied that a contrary doctrine would be very evil in its effects in this great commercial community of ours, where our business men necessarily spend a large portion of their time at inns, in the pursuit of their calling.

This much I have said on the clearly adjudicated cases. Now, let us see what the ablest elementary writers say on the subject, and for that purpose I shall only cite a few of the most eminent of English and American writers. Sir WILLIAM BLACKSTONE, from whom every willing student draws the true maxims of sound law, says (1 *Blackst. Com.*, 430): "If an innkeeper's servant robs his guest, the master is bound to restitution; for, as there is confidence reposed in him that he will provide honest servants, his negligence is an implied consent to the robbery." This elementary principle completely covers the case under consideration.

Our great commentator, Chancellor KENT, in speaking of the liability of innkeepers, lays down this clear and undisputed principle: that the innkeeper is bound absolutely to keep safe the property of his guest deposited within the inn, whether the guest acquaints the innkeeper that the goods were there or not. Moreover, he says the responsibility of the innkeeper extends to all his servants, and to all goods and chattels, and all moneys of the guest placed within the inn; and he adds, that the safe custody of the goods and money of the guest is a part of the contract to feed and lodge for a suitable reward, and that it is not necessary to prove negligence in the innkeeper, for, says he, "it is his duty to provide honest servants." What can be plainer than this, and what can be more in consonance with common sense, as well as clear common law? and I am satisfied this doctrine will put to violence the theories that there is no consideration for the extra risk entered into by the innkeeper for keeping the money; that the consideration is the charge of the innkeepor for the entertaining and caring for his guest.

To the lawyer and scholar, the names of Sir WILLIAM BLACKSTONE and Sir WILLIAM JONES on the one side of the ocean, and Chancellor KENT and Justice STORY on this, will be sufficient for my purposes in this case until some author or some case is cited, showing clearly that a contrary doctrine should obtain. It must follow, therefore, and I am satisfied from all my research, that the rule of law, to wit, that the innkeeper is responsible for all moneys deposited with him, is the correct and standard rule.

This is not the first instance this vague question of travelling

expenses has been interposed by innkeepers and urged by their counsel, in order to avoid their responsibility; but it has always been repelled, and it will be seen that, in many of the cases I have cited, the question has been treated and disposed of by a flat denial of such a dangerous doctrine.

The rights of parties, and such important rights as these under consideration, affecting, as they do, in their results, our whole travelling community, must be determined by sound law, handed down to us by the most eminent men, and not by any vague, undetermined, and partial, local usage, or any *dicta*. A strict adherence to this principle is particularly essential, in this day, to a sound and consistent administration of justice; and a departure from such a course works great injustice—for no man could know what were his rights or his duties, unless they are clearly defined by the precedents of the earlier times, declared by those great living lights and champions of just and wholesome law.

The judgment should be affirmed, with costs.

IN THE MATTER OF FISH'S ESTATE.

Surrogate's Court, County of New York; July, 1865.

INTEREST ON LEGACIES.

Under the provisions of the Revised Statutes, interest on general legacies commences to run from the period of one year from the issue of letters testamentary, not in one year from the death of the testator.

It seems, however, if a direction be given in the will for an earlier payment, or a clear inference can be drawn of such an intention on the part of the testator, from the language of the will, then interest commences to run from the time fixed for the payment of the principal; and annuities, or incomes and interest upon sums directed to be invested upon trust to pay over interest or income, commence to run from the death of the testator.

Petition to the surrogate for the payment of legacies, with interest.

The facts are stated in the opinion.

C. A. Hand and *John S. Lawrence*, for the petitioners.

W. C. Traphagan, for the residuary legatees.

S. F. Cowdry, executor, in person.

G. J. TUCKER, *Surrogate*.—The testatrix died March 13, 1862. Letters testamentary were issued upon the probate of her will, February 29, 1864, a litigation having been had in this court on the question of probate, lasting nearly two years.

By her will and codicil, a legacy of $20,000 was given to Allen S. Campbell, and one of $1,000 to Sarah Smith, since deceased. Mr. Campbell and the administrator of Mrs. Smith now petition for the payment of their respective legacies, demanding interest from the date of one year after the death of the testatrix. The executor admits the possession of assets, and submits to the surrogate the question "whether interest must be paid on the legacies from the period commencing at the expiration of one year from March 13, 1862, or from the period commencing at the expiration of one year from February 29, 1864," when the letters issued.

The question is, whether the statute, in allowing the executor a year after he became executor for his convenience in collecting the assets, before he should become liable to pay the general legacies, also postponed to the same time the right of the legatee to be allowed interest.

The Revised Statutes say (3 *Rev. Stat.*, 5 ed., 177, § 48): "No legacies shall be paid until after the expiration of one year from the time of granting letters testamentary, unless the same are directed by the will to be sooner paid."

And the rule is stated by Williams on Executors, 1221, that "the interest on general legacies is to be computed from the time at which the principal is actually due and payable."

When were the legacies to Campbell and Mrs. Smith due and payable? The will is silent. The law has therefore, I think, fixed their payment at the expiration of one year from the date of the letters.

But Surrogate Bradford, in Lawrence *a.* Embree (3 *Bradf.*, 364), held that "interest accrued from one year after the death

of the testator." He held that the Revised Statutes "had not changed the rule as to the payment of interest;" and that a deprivation of interest resulting from a delay in the probate of the will, would "award a premium for contestation, and sanction injustice." Upon these grounds he allowed the charge of interest after a year from death.

But this decision of Surrogate Bradford was made in October, 1855, and probably before that distinguished jurist was made aware of the decision of the Court of Appeals, rendered in June of the same year, in the case of Bradner *a.* Faulkner (12 *N. Y.*, 472).

The counsel for the petitioners in this proceeding have argued that the dictum in Bradner *a.* Faulkner is inapplicable to the present case, but I cannot so decide. It seems to me that the reporter's note is fully borne out by the express language of the decision. The former is, that "unless a will so directs, a legacy does not draw interest before it is legally payable." It is unnecessary to refer to English decisions, since this is held to be the rule under the statute of this State, which has indicated the policy of the Legislature as to legacies and their interest.

Chief-justice GARDINER said in this case: "As the will is silent on the subject of interest, and as the statute prohibits the payment of legacies until one year from the time of granting letters, and as the practice of the court, prior to the statute, allowed the same time to the executor, the decision of the court below" (in favor of interest from the death of the testator) "can only be justified by an express direction of the testator for earlier payment, or by an implication from the provisions of the instrument, equivalent to such direction." "The appellants can rely upon the general rule, that no interest would accrue until it became, by law, the duty of the executors to pay the legacy. The judgment of the Supreme Court should be reversed."

The rule with respect to interest on legacies and bequests would therefore appear to be pretty well settled in this State.

1st. Interest on general legacies commences to run from the period of one year from the issuance of letters testamentary.

2d. But if a direction be given in the will for an earlier payment, or a clear inference can be drawn of such an inten-

tion on the part of the testator, from the language of the will, then interest commences to run from the time fixed for the payment of the principal. This is not the case under the will now before me.

3d. Annuities, or incomes and interest upon sums directed to be invested upon trust to pay over interest or income, commence to run from the death of the testator. (42 *Barb. S. C. R.*, 533.)

Following the decision of the Court of Appeals, I feel compelled to deny the claim of these legatees to receive interest for any time earlier than from one year after the date of the letters testamentary.

WALTERS *a.* THE PEOPLE.

Supreme Court, First District; At Chambers, June, 1865.

WRIT OF ERROR.—REMITTITUR FROM COURT OF APPEALS.—SENTENCE.

Where, after sentence in a criminal case in a Court of Sessions, the judgment is reviewed upon writ of error, and affirmed in the Court of Appeals, and the day for execution fixed by the sentence has passed, it is competent for the Court of Appeals, in remitting the record, to direct the Court of Sessions to sentence the prisoner anew.

This may be done as well by remitting the proceedings to the Supreme Court, with directions to that court to remit them in turn to the Court of Sessions, as by remitting them to the Court of Sessions in the first instance.

The Court of Sessions, after the affirmance of judgment, have power to pass a full sentence anew, if the day fixed by the original sentence of execution has passed.

Application for a writ of error to the Court of Sessions of New York.

INGRAHAM, J.—An application is made for the allowance of a writ of error in this case. The prisoner was tried in the Sessions, and sentenced to be executed on 16th April, 1864, and a writ of error was brought. The judgment was affirmed in the

Supreme Court, and afterwards, in April, 1865, the judgment was affirmed in the Court of Appeals.

That court directed the proceedings to be remitted, with directions to the Supreme Court for the first judicial district to remit the proceedings to the Court of Sessions, to pass sentence in accordance with the judgment anew.

The general term of the Supreme Court ordered the record and proceedings remitted to the Court of General Sessions, with directions to pass sentence anew, in accordance with the judgment. The Court of General Sessions, on 12th May, 1865, sentenced the prisoner to be executed on the 23d June, 1865.

The alleged error consists in the direction of the Court of Appeals, followed by the Supreme Court, in ordering the Sessions to sentence the prisoner anew, and in the General Sessions so sentencing the prisoner to death.

The 26th section of the chapter in regard to writs of error, &c. (3 *Rev. Stat.*, 1035), provides, when the Supreme Court affirms a judgment in a capital case, it shall direct the sentence pronounced to be executed. In such a case, if the time of execution had passed, the court could fix another day for the execution.

The Court of Appeals might in this case have so ordered, and either remitted the case to the Supreme Court to fix the day of execution, or might have ordered when the execution should take place.

In 1863, the 24th section, before referred to, was amended by adding to it a proviso, that the appellate courts should have power, upon a writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the appellate court shall direct.

Under this amended section, either course might have been adopted. The Supreme Court could have ordered the sentence to have been executed, and fixed the day of execution, or could have remitted the record to the General Sessions to pass sentence again.

The direction of the Court of Appeals to the Supreme Court to remit the proceedings to the Sessions was not necessary, but at the same time was not error. It may be considered as surplusage, as it only directed what would have been consistent

with the law under a simple affirmance of the judgment. Or, if proper, its force and validity were not affected by remitting the proceedings to the Supreme Court to be remitted to the Sessions to pass sentence anew. Under either view, it was a mere statement and direction to do what the law prescribed for the Supreme Court on an affirmance of the judgment.

Objection is taken to the sentence of the Sessions as being a full sentence, instead of merely fixing a day of execution. The statute does not give the Sessions authority to fix the day, but to pass such sentence anew, in accordance with the judgment of the appellate court. This was done in conformity with the statute. The Sessions is to pass such sentence as the appellate court shall direct.

The final sentence had become a nullity, the time of execution having expired, and when the Court of Appeals ordered the Sessions to sentence the prisoner anew, it was a direction from the appellate court to the court below, in accordance with the statute.

Such direction was given in the Ratzky case by the Court of Appeals directly to the Oyer and Terminer. The fact of the transmission of the directions through the Supreme Court does not, in my judgment, affect the regularity of the proceedings.

My opinion is, that there is no error in the proceedings; and that the application should be denied.

THE SUN MUTUAL INSURANCE CO. *a.* DAVIS.

New York Superior Court; General Term, June, 1865.

INSURANCE.—DEMURRER TO COMPLAINT.

Where an open policy of marine insurance is issued for the benefit of a person designated, or whom it may concern, and merchandise to which the terms of the policy are applicable, belonging to such person and defendant jointly, is entered upon the policy pursuant to an agreement between them to insure at their joint expense, the defendant is liable to the insurers for the premium.

The Sun Mutual Insurance Co. *a.* Davis.

Demurrer to complaint.

This action was brought to recover premiums of insurance on a policy issued by the plaintiffs. The contents of the pleadings are stated in the opinion. The demurrer was sustained at special term, and the plaintiffs appealed.

J. H. Choate, for the appellants.

Mr. Anthon, for the defendants.

By the Court.—McCunn, J.—In discussing the merits of this demurrer, we are not warranted in looking at the facts in any other light than as the complaint presents them, because the interposition of a demurrer admits the truth of all the allegations contained in the complaint, and the only question to be determined is, whether a judgment entered upon these facts would be good and valid in law?

The complaint alleges that the two firms, William Grove & Co., of New York, and Davis & Toscano, of Cuba, entered into a partnership to buy and ship sugars from Cuba to New York; that it was agreed between all the partners that Grove & Co., the members of the firm in New York, were to insure the goods so shipped at the joint and equal expense of both firms, out of the proceeds of the shipments; that on being advised of the shipments, William Grove & Co. applied to plaintiffs to insure the goods for the joint and equal account and interest of all the defendants; and that, in consideration of the premiums agreed to be paid by the new copartnership, the plaintiffs did—in an open policy, for whom it may concern, and upon which, by its terms, shipments of the said description were applicable, and which policy had been effected by and in the name of William Grove & Co. some time previous—allow the risks to be entered; that the defendants paid, on account of the said premiums, $444.24; and that there remains a balance due and owing, for which they ask judgment.

This is a brief outline of the facts set up in the complaint, and I am clearly of opinion they would warrant the entry of a judgment thereon.

The policy declared on is an open policy, and is in the or-

dinary form, and contains the usual clause—for whom it may concern; and it had been effected by William Grove & Co., before the partnership between them and Davis & Toscano was formed. Yet the company had a right to select their risks thereunder; and as they thought proper to assume these risks in consideration of the premiums agreed to be paid by the defendants, they are clearly entitled to recover. It is true, the policy was effected in the name of William Grove & Co., but no presumption of law arising on the face of the policy can presume away an express promise made afterwards by other parties for a full consideration. Moreover, one-half of the sugars entered under the risks were the goods of Davis & Toscano, and under this form of policy they had a right to enter these shipments as risks; and consequently they had an interest in, and were entitled to, the benefits of the policy, and by virtue of mutuality of contract they became liable to the insurers. (3 *Kent's Com.*, 9 ed., 344; 2 *Cai.*, 208.)

And for all that appears in the complaint, the policy may have been effected by William Grove & Co., in their own name, to cover these very risks; at any rate, the complaint alleges that all the parties agreed to pay, or be responsible, for the premiums at the time the risks were entered, and it was for this consideration the risks were assumed by the company.

It may be remarked, here, that the facts set out in the points offered to sustain this demurrer, can be conveniently set up in the form of an answer.

The order must be reversed, with costs. The defendants to be permitted to withdraw their demurrer, and answer within twenty days, upon payment of costs.

ROBERTSON, Ch. J., and GARVIN, J., concurred.

HOWELL *a.* KNICKERBOCKER LIFE INSURANCE CO.

New York Superior Court; General Term, June, 1865.

INSURANCE.—DEFAULT IN PREMIUM.

Where a policy of life insurance provides that it may be continued from year to year if the premiums be paid on or before specified days, such payment is a condition precedent to the continuing of the policy.

Parol evidence, of a usage or agreement on the part of the insurer to receive payment of premiums after the day upon which they were due, will not suffice to vary the written contract.

The fact that on a day on which a premium became due, the insured received his death-stroke by a disease from which he died on the day following, does not alter the case. The insurers are not liable in such case, unless a tender of the premium, on the day on which it became due, or at least before the death of the insured, is proved.

Appeal from a judgment.

This action was brought by the widow of George H. Howell, to recover on a policy of insurance upon the life of her deceased husband, issued by the defendants. The facts are fully stated in the opinion of the court.

S. P. Nash, for the plaintiff.

Wm. F. Allen, for the defendants.

BY THE COURT.—MCCUNN, J.—This is an action on a policy of insurance, on the life of George H. Howell. The policy was effected by his wife, and was in the ordinary form, and for one year, but could be renewed annually for life, if on the 15th of July in each year the premium was paid.

On the 15th of July, 1864, the annual premium became due, and was not paid; and on that day the life so insured was seized with apoplexy, and on the 16th, the day following, Mr. Howell died; and some days after, the premium was tendered to the

company, and they refused to receive it, and this action is brought to recover the amount of the policy.

In this case, it is only material to consider whether at the time of the death of the life insured, the policy had not expired, because, if the policy had expired at the time, the plaintiff cannot recover.

The insurance was for one year, and it was agreed that it should be continued or renewed from time to time until the decease of Mr. Howell; provided always that the life insured, or those interested in that life, should pay or cause to be paid annually to the company, on or before the 15th day of July, in each year, the sum of $138.50; and one of the conditions annexed to the policy was, that no insurance, whether original or a renewal by receipt, should be binding on the company until the actual payment of the premium; and the whole frame of the policy shows that every premium must be paid during the life of the insured: indeed, the agreement and consideration for the insurance is the payment of the yearly premium to be paid during the life of Mr. Howell, and the risk insured against is Mr. Howell's death. It is contended, on the part of the plaintiff, that on the 15th day of July, the day on which Mr. Howell was stricken with apoplexy, he received his death-wound or mortal stroke, and that he was then dead to all intents and purposes. This cannot be, because Mr. Howell was alive and died on the 16th; and it will not be contended that if Mr. Howell, after apoplexy had seized him, had lingered for months, and the policy had not been renewed by the payment of the premium, that the parties for whose benefit the policy was effected could have recovered; and the rule is as strict with a day of neglect as with a year. If they could not renew after the lapse of a year, they could not after the lapse of a day, without the consent of the company. Something has been said about an agreement on the part of the company with the deceased, to the effect that days of grace would be allowed if the premium was not paid on the day it became due. I can find no such agreement in the case; on the contrary, the complaint alleges that the yearly premiums were all paid promptly on the 15th day of July in each and every year, agreeably to the terms of the policy.

It is true there is evidence introduced to the effect that the

company, in dealing with other persons, allowed days of grace within which to pay the annual premium beyond the time fixed by the policies, and that, in accordance with that custom, they had been in the habit in some cases of receiving premiums after the days fixed; and that it was understood and agreed verbally between Mr. Howell and the company, at the time the insurance was effected, that if any thing should happen to him to prevent his paying the premium on the day it became due, the policy should not become null and void. This evidence was objected to, and should have been excluded; but even if it had not been objected to, it would not help the plaintiff's case. No verbal agreement or understanding of any kind can vary the terms of the policy (Tarlton *a.* Staniforth, 5 *Term R.*, 695; Pritchard *a.* The M. & T. Mutual Life Insurance Society, 3 *Com. Bench, N. S.*, 622; Buckbee *a.* The United States Ins. Co., 18 *Barb.*, 541); and the custom of the company or their verbal agreement, if any there was, only extended to lives in being; it could not, and was not not intended to apply to premiums offered to be paid after the death of the insured. In the case of Prichard *a.* The Merchants' Life Insurance Company, where the insured had thirty days after the date fixed in the policy for the paying of the same, and the life insured died before the thirty days of grace had expired, it was held by the full bench that the parties interested in the policy, even where the premium was paid and accepted within the thirty days, could not recover.

In the case of Ruse (23 *N. Y.*, 516), Judge SELDEN says: "It is plain that, if we are to look to the policy alone, as containing the contract between the parties, the obligation of the defendant ceases upon the failure of the plaintiff to pay the annual premium" on the day fixed in the policy for such payment. The policy under consideration is almost similar to the one passed upon by that learned judge, and nothing can be more explicit on the subject of paying the annual premium than the language of the clause of the policy under consideration, and no verbal understanding can vary it. The cases of Wood *a.* Worsley (2 *H. Blackst.*, 574); Nightingale *a.* The State Mutual & Ins. Co. (5 *Rhode I.*, 38); Want *a.* Blunt (12 *East*, 183); Simpson *a.* The Accidental Death Ins. Co. (2 *C. B., N. S.*, 257), and numerous other American and English cases, can be cited in

support of this doctrine, and I have been unable to find in any of the books a single case tending in the slightest degree to shake this rule.

The conditions imposed by the policy arise from the contract between the parties; they are not conditions imposed by law—they are conditions precedent; and, therefore, strict performance can only be excused by consent, or by some act of the defendant. (Pike *a.* Butler, 4 *N. Y.*, 360; 1 *H. Blackst.*, 433; Harmony *a.* Bingham, 12 *N. Y.* (2 *Kern.*), 99; Weston *a.* Collins, 12 *Law Times, N. S.*, 5.)

It is, therefore, clear that the payment of the premium, on or before the 15th day of July, was a condition precedent to the renewal or continuing of the policy; and that, before a recovery can be had on this policy, the parties seeking such relief are bound to prove all the conditions contained therein, and especially the condition requiring the payment of the premium on the 15th of July, the day on which it became due, or at least the payment of the same before the death of Mr. Howell (12 *East*, 191).

For these reasons, we are of opinion that the death of Mr. Howell, which happened on the 16th of July, 1864, was during a period of time not covered by the policy; and that, under a fair construction of the same, the insurance could not be continued beyond the day on which the annual premium was payable, which was on the 15th of July, 1864, and was not revived or renewed by a tender of the premium after his death, though within two or three days after the date upon which the premium was payable.

Judgment reversed, and new trial ordered, with costs.

Robertson, Ch. J., and Garvin, J., concurred.

CHRISTIANSON *a.* SINFARD.

New York Superior Court; General Term, February, 1865.

ESTOPPEL.—WAIVER OF CAUSE OF ACTION.—DEFENCES.

The rule that where the true owner of land tacitly suffers another person to occupy and improve the same without interposing his own claim, he will be barred in equity from claiming the property without compensation for the improvements, does not apply where his acts or silence have not misled such other party.

Where the person encroaching knows what he is doing, it is not necessary for the true owner, in order to protect his rights, to give notice to desist.

When a cause of action has once accrued, it can only be destroyed by satisfaction or release.

Thus, where the defendant owning land, and knowing what was his true boundary, put up a building which encroached upon the adjoining land of the plaintiff;—*Held*, that the mere passive acquiescence of the plaintiff did not affect the title.

Appeal from a judgment entered on the report of a referee.

J. C. Dimmick, for the plaintiff.

Mr. Schefflin, for the defendant.

BY THE COURT.—MCCUNN, J.—The dispute in this case arises from the overlapping of a wall on an adjoining lot in Thirty-second-street in this city. Plaintiff and defendant bought at different times two lots adjoining each other. On the plaintiff's lot there was a house. After the purchase it was ascertained that the house encroached on the defendant's lot 5¼ inches in front and 4¼ in rear. Plaintiff brought ejectment, and when the cause was about to be tried, an arrangement was entered into whereby the suit was discontinued, and the number of inches on which the house encroached was conveyed to plaintiff for the consideration of $316. The conveyance, however, not only carried with it the land on which the encroachment was, but also covered the strip back to and ending in a point in

the rear of the lot. Afterwards the defendant built on his lot, and instead of adhering to his agreement, he extended his house and fence over the vacant ground he had recently conveyed to plaintiff, and for the recovery of which this action is brought.

It is claimed by the defendant that the conveyance of the strip of ground the entire length of the lot was a mutual mistake; and that the defendant only intended to convey the number of inches which the house overlapped; also, that the defendant was estopped from claiming his land because he did not protest when defendant was building his house.

After a careful examination of the case, I am satisfied that neither of these grounds can be maintained.

It would certainly not be very complimentary to the legal gentlemen engaged on both sides in the first litigation, to believe that where a matter was in dispute, and an amicable settlement had taken place, that both the counsel could have been mistaken, for they both testify that it was intended that the entire strip should pass. Besides, there are no less than two agreements in writing to that effect—the agreement to sell and the deed conveying; and in addition we have the positive testimony of the plaintiff, declaring that the whole strip was intended to be conveyed.

Against this strong array of testimony I can only find the evidence of the defendant, as to what he believed and intended to convey.

I am at a loss to conceive what theories in regard to the application of evidence could have taken possession of the referee's mind, when he found that a mistake had been made in the conveyance, for his findings in this respect are clearly against the preponderance of proof.

The remaining question to be considered is, how far the acts or admissions of the plaintiff, made when the wall was being built, will estop him from a recovery in this action.

The leading principle of estoppel is the mutuality of minds. There must be consent, or there must be entire ignorance on one side, and concealment of the facts by the other, from interested motives.

If a party owning land knowingly suffers another to purchase the same, and the purchaser improves the property without the

owner making known his claim, the law is, that he shall be barred in equity from claiming the property, without compensation for the improvements. This is the rule laid down in the case of Town *a.* Needham (3 *Paige*, 545), and in 7 *Barb*, 409, and 8 *Ib.*, 102. But this principle can only be applied where the acts or admissions of the owner have been such as to mislead and injure an innocent party. In this case, however, the defendant positively knew he had parted with his title; consequently he had no right to build on the premises. I hold that, where the party encroaching knows what he is doing, it is unnecessary for the plaintiff to protest, or to inform the defendant of the wrong he is perpetrating. This is established in Miller *a.* Platt (5 *Duer*, 273); Swick *a.* Sears (1 *Hill*, 17). The encroachment in this instance was perfected before the plaintiff knew any thing of it; for I find, from the evidence, that the wall was four or five feet high before the plaintiff knew what defendant was doing on the premises, and consequently plaintiff's right of action had accrued; and it is well settled that where a cause of action accrues, it can only be released for a valuable consideration.

The case of Bayles *a.* Usher (4 *Moore & Payne*, 791) is a leading case in establishing this doctrine. That case was an action of trespass for a wrongful distress of goods for rent. The property had never been removed, and the plaintiff had the free use of the same, and it was absolutely restored to him before suit was brought. Yet the action was held to lie. The court there clearly defined the rule to be, that where a right of action once vested, it could only be destroyed by release, or by the receipt of something in satisfaction; and such was the language of Justice PAIGE, in the case of McKnight *a.* Dunlop, 5 *N. Y.* (1 *Seld.*, 537), and of Judge COWEN, in the case of Bowman *a.* Teall, 23 *Wend.*, 309); and in the case of Willoughby *a.* Backhouse (4 *Dowl. & Ryl.*, 539), BAYLEY, J., said that there was no such thing as a man's waiving his right of action when once a wrong had been committed. Indeed, the principle of law to that effect is so clear that it is useless to cite cases in support of the proposition.

The case of Miller *a.* Platt (5 *Duer*, 273), in this court, is an analogous case to the one under consideration, and the conclusions of law there settle the question involved here. In that

case it was held that the mere standing by and suffering another to erect a building is not effectual to give title. Also, The King *a.* The Inhabitants of Butterton (6 *T. R.*, 554); Swick *a.* Sears (1 *Hill*). In the case of The King *a.* Inhabitants of Butterton, Justice LAWRENCE intimated that such silence could only excuse a trespass, but that it could not pass a title. Indeed, in the case of Whitney *a.* Holmes (15 *Mass.*, 152) the court went so far as to say that a party cannot be barred of lands except by record or deed; and in the case of Gerrish *a.* The Union Wharf (26 *Maine* [13 *Shepley*], 384), it was held that a written instrument, not under seal, could not estop a party from claiming his land. It might excuse trespass, but could not affect title. In the case of Swick *a.* Sears, where a party purchased premises, and plaintiff stood by and saw him purchase and pay his money, and also advised him to purchase, and declared that a deed would pass the premises and make defendant's title perfect, it was held that, in a court of law, the party so advising was not estopped from claiming the lands.

The principle could be further illustrated by citing numerous other American and English authorities, but I have satisfied myself by simply referring to the above cases.

When the defendant in this action built his wall, the evidence is clear that he knew perfectly well how far his line extended; and that when he so built, although the plaintiff may have passively acquiesced with the course he was pursuing, yet he was building at his peril. Such acquiescence on the part of the plaintiff does not, in my opinion, release the defendant from responsibility in this action.

The judgment should be reversed and a new trial ordered, with costs.

ROBERTSON, Ch. J., and GARVIN, J., concurred.

CARPENTER *a.* DANFORTH.

Supreme Court, First District; Special Term, June, 1865.

INJUNCTION.—CONSTRUCTIVE FRAUD.

Where a defendant fully answers, in words, the equities of the complaint, it does not follow necessarily that an injunction should be dissolved, particularly where its continuance could be of no pecuniary damage to the defendants, and is necessary to the full satisfaction of the plaintiff's demand.

Though the relation of trustee and *cestui que trust* does not strictly exist between parties, yet their relation to each other, and the subject-matter of the transaction, may be such as to require the fullest disclosure of facts known by one party, to preclude the presumption of fraud.

Motion to dissolve an injunction.

The complaint of the plaintiff, Francis B. Carpenter, set up the following facts: that he was the administrator of Lloyd Glover, who had during his lifetime formed with the defendant, George H. Danforth and others, the "National Bank Note Company;" that the plaintiff's decedent and Glover had both been active trustees in the management of the company; that the company had declared no dividends, applying all its profits to the enlargement of its business and accumulation of materials; that at the time of Glover's death he owned 136 shares of the stock, of the par value of $50 per share, subject, however, to liens to very nearly the amount of its par value; that after Glover's death there being no market quotations of the stock, and the plaintiff being utterly ignorant of the affairs of the company, he was induced, by the representations of the defendant Danforth of his friendliness to Mr. Glover's children, and by his concealment of the state of the company, to sell the stock to him at $60 per share; that at the time of the sale the assets and condition of the company, as known to the defendant Carpenter, rendered the stock of much higher value; and that within five months after, it declared a dividend of 310 per cent., and again within thirteen months of 200 per cent.; that the

defendant had used pressure to procure the sale to be made immediately, and had had the stock conveyed to the other defendant, James A. Williamson, but for his, Danforth's, use.

The complaint asked for restitution of the stock, and an accounting for the dividends received upon it by the defendants, and an injunction.

An injunction was accordingly granted, restraining the defendants from transferring, or disposing, or using the stock.

The defendant Danforth answered, admitting the purchase, and that he was one of the trustees of the company, but denying any special knowledge of the pecuniary affairs of the company beyond that of any stockholder; denying all pretences of friendly feelings towards Mr. Glover's children; and setting up that the condition of the company at the time of the purchase was such, owing to the worthless nature of a large portion of their assets, and the contingent nature of another part, that $60 per share was a good price, and larger than others were willing to pay, and added letters to show that the whole transaction was free from fraud or overreaching on his part.

On the answer and on affidavits, the defendants moved that the injunction be dissolved.

Evarts, Southmayd & Choate, for the motion.

E. N. Taft, opposed.—I. To bring the case within the principle governing purchases by a trustee from his *cestui que trust*, it is not necessary that the trustee should have the legal title as technical trustee of the other; any analogous relation of a fiduciary character is within the rule. (The York Building Co. *a.* McKensie, *Brown's P. C.*, 8 *Tomlin's Ed.*, 42, 64; Farnam *a.* Brooks, 9 *Pick.*, 231; *Willard's Eq. Jur.*, 169; *Story's Eq. Jur.*, §§ 308–315, 321, 323; Poillon *a.* Martin, 1 *Sandf. Ch.*, 569; Gibson *a.* Jeyes, 6 *Ves.*, 277, 278; Huguenin *a.* Baseley, 3 *Leading Cases in Eq.*, 94 [*463], and notes; notes to Keech *a.* Sandford, 1 *Ib.*, 91; Fox *a.* Mackreth, *Ib.*, 194, 208; Van Epps *a.* Van Epps, 9 *Paige*, 241; Torrey *a.* Bank of Orleans, *Ib.*, 662; Claflin *a.* The Farm. & Cit. Bank of L. I., 25 *N. Y.*, 293.)

II. The relation between the defendant Danforth and the plaintiff, administrator of the deceased stockholder, was one of

confidence. In respect to the subject-matter of the sale, the former was the *quasi trustee* or agent, and the latter the *cestui que trust* or principal (Scott *a.* De Peyster, 1 *Ed. Ch.*, 513; Verplanck *a.* Mercantile Ins. Co., *Ib.*, 84; Robinson *a.* Smith, 3 *Paige*, 230; Cunningham *a.* Pell, 5 *Ib.*, 607; 3 *How. U. S.*, 133); and though a person in that relation may not be absolutely prohibited from becoming the purchaser from the other, he cannot profit by his superior knowledge and buy at an inadequate price, nor without disclosing every fact which is material to the sale or affects its expediency. (Cumberland Coal Co. *a.* Sherman, 30 *Barb.*, 553; Aberdeen Railway Co. *a.* Blakie, 1 *Macqueen*, 461, 471; Poillon *a.* Martin, 1 *Sandf. Ch.*, 569; Farnam *a.* Brooks, 9 *Pick.*, 231; 1 *Story's Eq. Jur.*, §§ 315, 323; *Willard's Eq. Jur.*, 190; Brooke *a.* Berry, 2 *Gill.*, 83, 102; Gibson *a.* Jeyes, 6 *Ves.*, 277; 5 *Serg. & Rawle*, 65; Howell *a.* Ransom, 11 *Paige*, 538; Van Epps *a.* Van Epps, 9 *Ib.*, 238; *Ib.*, 662; 4 *Cow.*, 736, 740.)

Sutherland, J.—Though probably the relation of trustee and *cestui que trust* did not strictly exist between the plaintiff and Danforth, yet considering their situation and relations to the stock in question, I think Danforth was bound to disclose to the plaintiff all the material facts within his knowledge, which tended to enhance the value of the stock, and which might result in enabling the company to declare the enormous dividends which it did declare subsequently.

Whether the defendant Danforth did, or did not do so, can be better and more safely determined after the trial than on this motion.

Though the answer is drawn with great precision and fulness, and may be said fully to answer the equity of the complaint in words, yet I do not think it follows, as matter of course, that the continuance of the injunction should be denied.

I do not think I should be justified in dissolving the injunction before the trial, particularly as I cannot see that the retention of the injunction can be of any pecuniary damage to the defendants; while if the plaintiff finally succeeds in the action, he will be entitled, among other things, to a re-transfer of the specific stock.

As to the plaintiff's subsequent letter to the defendant, it is difficult to give due effect to it, until the trial of the main issue as to the alleged original undue advantage.

The motion to continue the injunction must be granted, with $10 costs to abide the event of the action.

BLAIN *a.* TAYLOR.

Supreme Court, First District; Special Term, October, 1864.

COVENANT RUNNING WITH THE LAND.

A covenant to keep up a partition fence is a covenant running with the land, and where it imposes a liability other than that imposed by the statute as to "division fences," is an encumbrance within the meaning of a covenant to convey free of all encumbrance.

An agreement by the owner of land, with a railroad company, under the statute to make and repair fences along the road running through his farm, is a covenant running with the land, and is within the meaning of the covenant to convey free of all encumbrance.

Demurrer to complaint.

The complaint showed, 1st. That on the 16th day of April, 1864, the defendants agreed to sell to the plaintiffs a certain farm in South Dover, Dutchess County, N. Y., "adjoining the New York and Harlem Railroad, free from all encumbrances except as to a mortgage," &c. That on examining title, plaintiffs found recorded "a covenant and agreement made by Robert L. Reade (a former owner of said premises) with the New York and Harlem Railroad Company, dated, April 24, 1851, by which he, in consideration of the sum of two dollars per rod, &c., did for himself, his heirs, and assigns, being owners of said farm, covenant and agree with the New York and Harlem Railroad Company, to build, and forever maintain, good and sufficient fences on both sides of said railroad, through said farm;" by the same instrument releasing the said railroad

from "all claim for damages in consequence of their neglect in not having said fences completed previous to that date."

Plaintiffs showed willingness to perform on their part, but claimed that defendants could not, and did not perform on their part, by virtue of the aforesaid agreement with the Harlem Railroad, which agreement the plaintiffs alleged constituted a covenant running with the land, and was an encumbrance.

The defendants demurred on the ground of insufficiency.

William A. Coursen, in support of the demurrer.

Abraham B. Tappen, for the plaintiff.—I. By common law, the owner of land was bound at his peril to restrain his cattle, and thus indirectly to maintain fences. By the general railroad act, 1850, § 44 (1848, § 42), *Laws of* 1850, 233, the duty of maintaining fences and cattle-guards along railroads was imposed on all railroad companies. By that act they became liable for any damages arising from their neglect in maintaining such fences. (Corwin *a.* Erie R. R. Co., 3 *Kern.* (13 *N. Y.*), 42.)

II. The act of 1848 applies to then existing corporations, and is constitutional. (Suydam *a.* Moore, 8 *Barb.*, 358; Waldron *a.* Rens. & Sar. R. R. Co., *Ib.*, 390.)

III. Though the railroad company may be primarily liable to the public for damages arising from neglect to maintain fences, yet it is provided (see statutes below cited), that as between the railroad company and the owner of land adjoining, "who has received, or whose grantor has received, a specific sum as compensation for fencing, and has agreed to build and maintain such fence," the owner is bound to maintain such fence; and if he neglect, an action will lie by the railroad company against him. A lapse of six years in which this liability has not been enforced does not discharge. (*Laws of* 1854, ch. 282, § 9; 2 *Rev. Stat.*, 5 ed., 690, § 57; Poler *a.* N. Y. Central R. R. Co., 2 *Smith* (16 *N. Y.*), 476; Duffy *a.* Harlem R. R. Co., 2 *Hilt.*, 496; Talmadge *a.* Rens. & Sar. R. R. Co., 13 *Barb.*, 493.)

IV. This covenant to keep partition fences runs with the land, and is an encumbrance. (Kellogg *a.* Robinson, 6 *Vermont*,

276; Savage *a.* Mason, 3 *Cushing*, 500; *N. Y. Sess. Laws of* 1854, 612, § 9.)

V. It is fair to presume that the plaintiffs did not know of this agreement when entering into the contract of sale; and that they supposed the duty of maintaining fence rested on the railroad company. On making examination of title, this agreement with the railroad company appeared upon the Dutchess County Records, and the party agreeing to convey (the defendant herein) not making proper deduction, the title was rejected and this action brought.

CLERKE, J.—Undoubtedly, although a covenant is made by one for "himself and his assigns," yet if the thing to be done is merely collateral, and in no respect concerns the land, an assignee is not bound. For instance, if a lessor covenants in the lease to build a house upon other land than his, or to grind at the lessor's mill, according to the custom, all the corn, grain, or malt which the lessee may have occasion to use or spend, these covenants are not binding on the grantee or assignee.

Where a lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill, situated on the premises demised, who were settled in other parishes, without a parish certificate; this covenant was holden not to run with the land, or to be obligatory upon the assignee of the lease. The covenant must be such as *per se*, and not merely from collateral circumstances, affects the value of the land. (The Mayor, &c., of Congleton *a.* Pattison, 10 *East*, 130.)

The covenant in the case before us, however, is not collateral, but relates to the land itself. The keeping of a fence or partition in repair affects the land as much as keeping a house, or any other building on the premises, in repair. In Watertown *a.* Cowen (4 *Paige*, 510) it was decided by the Chancellor that a covenant not to erect a building in a common or public square, owned by the grantor in front of the premises conveyed, was a covenant running with the land, and passed to a subsequent grantee of the premises without any special assignment of the covenant. The case most in point is that of Kellogg *a.* Robinson (6 *Vermont*, 276), in which it was holden that a covenant in a deed of conveyance, that the

grantee shall maintain the partition fence between the lands conveyed and other lands of the grantor, was a covenant running with the land. But I consider that the statute (*Laws of* 1854, § 9) is conclusive on this subject, in cases like that under consideration.

It expressly enacts that it shall be the duty of every owner of land adjoining any railroad, who has received, or whose grantor has received, a specific sum for compensation for fencing along the line of land taken for the purpose of said railroad, and has agreed to build and maintain a lawful fence on the line of said road, to build and maintain said fence; and it further provides, that if said owner, his heir, or assignee shall not within thirty days after notice build such fence, or if built, shall neglect to maintain said fence, the railroad company may build or repair, as the case may be, and may maintain an action against the person so neglecting, for the purpose of recovering the expenses thereof. It is quite clear then that the plaintiff would be liable, by the terms of the agreement, forever to maintain in good and sufficient condition the fences on both sides of that portion of the New York and Harlem Railroad running through the farm which the defendants have agreed to sell to the plaintiffs. This is a liability to which a grantee would not be subjected, if no such agreement had been made, and no such compensation had been received by Robert L. Reade, a former owner of the farm. The statute relating to "division fences" imposes no liability of this kind.

Therefore, as it is not in the power of the defendants to convey this farm pursuant to their contract, free from all encumbrances, the plaintiff is entitled to recover.

The demurrer must be overruled, with costs; and judgment thereon for the plaintiffs, with liberty to defendants to answer within ten days, on payment of costs.

RYAN *a.* THE PEOPLE.

Supreme Court, First District; General Term, June, 1865.

TRIAL.—EVIDENCE.—EXCEPTION.

A charge to the jury, that "in a clear case of guilt, where a man is caught in the act of the commission of a crime, good character is no shield and protection:—good character is only a shield and protection where it is interposed in doubtful cases;"—*Held*, erroneous, where the evidence was of doubtful character.

A general exception to the judge's charge is not available to support an appeal for error in particular portions of it; but special circumstances may make it expedient to grant a new trial for such error.

Appeal from a conviction.

David Ryan was convicted in the Court of General Sessions of larceny from the person of one John Jourdan, who was the principal witness for the People, and who was shown to have been "under the influence of liquor quite noticeably," at the time of the larceny. Two witnesses testified to the good character of the accused.

The recorder charged, among other things, as follows:

"The only evidence" (for the accused) "is evidence of good character. Allowing, gentlemen, that this evidence is satisfactory on the question of good character, good character is never available unless the evidence is evenly balanced. In a clear case of guilt, where the man is caught in the act, in the commission of a crime, good character is no shield and protection. Good character is only a shield and protection where it is interposed in doubtful cases, because it repels the presumption of guilt."

The counsel for the prisoner, after excepting to a portion of the charge not included in the decision, excepted, on the suggestion of the court, to the whole charge.

M. J. A. McCaffery, for the appellant.—I. A general excep-

tion is ordinarily unavailable; but the cases in which that rule has been laid down differ from the present case in this respect, viz., that in this case the general exception is sustained and supported by the several specific exceptions to different portions of his honor's charge.

II. Even a general exception, standing alone, is available, if the whole scope and drift of the charge is incorrect or improper. (Van Kirk *a.* Wilds, 11 *Barb.*, 520; Potter *a.* Seymour, 4 *Bosw.*, 140; Nevins *a.* Bay State Co., *Ib.*, 225.)

III. The general exception was forced upon the prisoner's counsel. It was made in consequence of a distinct suggestion of the judge, who did not wish to hear the further specific objections of the defendant's counsel. Even a slight suggestion of a judge, counsel are, from their position in court, in a manner compelled to obey.

The suggestion which was made, and, of course, acted upon in this case, appears on the face of the record, and, of itself, renders the general exception available.

IV. The only reason for calling a judge's attention to specific portions of his charge to the jury, is to enable him to correct errors or supply deficiencies that were occasioned by inadvertence or misapprehension. That reason (and in consequence, the necessity of making specific exceptions), can scarcely apply in a case where the judge says beforehand, and in emphatic and unmistakable language, that he will not charge otherwise than as he had already charged.

V. In consequence of silencing prisoner's counsel by that suggestion, the prisoner is entitled here to all the specific exceptions which his counsel would or might have taken at the trial.

VI. Granting that the evidence was not satisfactory on the question of good character, that was for the jury, not for the court, to determine. Good character is always available. (Cancemi *a.* People, 16 *N. Y.*, 506; Stephens *a.* People, 4 *Park.*, 396.)

VII. "In a clear case of guilt, where a man is caught in the act, in the commission of a crime, good character is no shield and protection."

This was evidently meant to refer to the prisoner, at least the jury might well understand it to refer to him,

and was therefore erroneous. (Coles *a.* Marquand, 2 *Hill*, 447.)

VIII. "Good character is only a shield and protection where it is interposed in doubtful cases, because it repels the presumption of guilt."

In doubtful cases the prisoner is, of right, acquitted, without any evidence on his part; it is for the prosecution to make out a clear case, not for the defence to prove prisoner's innocence.

IX. The whole tendency of these remarks was to exclude from the consideration of the jury the positive and overwhelming testimony as to the prisoner's good character, which, considering the contradictory and impossible statements of Jourdan (so drunk at the time of the alleged robbery as to be hardly able to run), should, and under a proper charge, would, have acquitted the prisoner.

In People *a.* White (24 *Wend.*, 520), the judge simply commented on the absence of proof of good character. Held error, and a new trial was granted.

Reversing same case in 22 *Ib.*, 167.

A. Oakey Hall, for respondents, urged that there was no exception to the charge about character which seems opposed to Cancemi's case.

By the Court.*—Ingraham, P. J.—In this case the judge in the court below charged the jury: "In a clear case of guilt, where a man is caught in the act, in the commission of a crime, good character is no shield and protection. Good character is only a shield and protection where it is interposed in doubtful cases, because it repels the presumption of guilt." The testimony of the felony in this case came from only one witness, who could not tell whether he was under the influence of liquor or not, and a policeman, who saw him, testified that he was in that condition.

In the People *a.* Cancemi (16 *N. Y.*, 501), the evidence of good character was taken from the jury, by telling them that

* Present, Ingraham, P. J., Clerke and Barnard, JJ.

it must be considered far inferior as a defence in cases of great criminality than in cases of a lesser degree of crime; and this was held to be error, if not by controlling the weight of the evidence, as calculated to mislead the jury as to the weight which the evidence should receive.

The charge in the case of Cancemi was in consonance with that of Ch. J. SHAW, in The Commonwealth *a.* Webster (*5 Cush.*, 295); but in that case, he added, "But, still, even with regard to the higher crime, testimony of good character, though of less avail, is competent evidence for the jury, and a species of evidence which the accused had a right to offer." And in Wharton's Cr. Law (§§ 643, 644), several cases are cited where the instruction to the jury, "that in a clear case character has no weight," is condemned.

It is objected, however, on the part of the People, that no direct exception is taken to the charge on this point. This is true, although, on the suggestion of the court, the defendant's counsel excepted to the whole charge. While such a general exception is not available, we cannot avoid the conclusion, that the effect of the charge in this respect was to take from the jury the consideration of good character, where that evidence was entirely uncontradicted, and where the principal witness at the time of the transaction was shown to have been in a state of intoxication. This may have worked injustice to the prisoner; and although under ordinary circumstances we should require an exception to be taken to the various portions of the charge excepted to, the circumstances of this case are such as to make it more expedient to order a new trial, rather than to expose the prisoner to imprisonment in the state prison, on the sole testimony of a person who was intoxicated at the time of the alleged offence, and while his counsel might, under the suggestion of the judge, have supposed a general exception was sufficient.

Judgment reversed, and new trial ordered in the Sessions.

PORTER *a.* BRONSON.

New York Common Pleas; General Term, June, 1865.

ACTION ON JUDGMENT.—UNAUTHORIZED APPEARANCE.—DEFECT OF JURISDICTION.—MARINE COURT.

In an action upon a judgment of a court of record, the defendant may show that he had not been served with process and had never appeared in the action in which the judgment was recovered.

The recitals of these facts in the judgment are presumptive, but not conclusive, evidence of the jurisdiction.

The unauthorized appearance of an attorney of the Supreme Court, for a defendant not served with process, will not confer jurisdiction on the Marine Court so as to prevent the defendant from going into the merits of the original controversy in a subsequent action on the judgment rendered in the Marine Court.

The Marine Court is not a court of record for all purposes; and attorneys at law, as such, belong only to courts strictly courts of record, except when otherwise expressly provided by statute.

Whether the act relating to district courts (*Laws of* 1857, ch. 344), makes attorneys at law officers of those courts,—*Query?*

Appeal from a judgment.

This action was brought by John W. Porter against Henry G. Bronson, upon a judgment which one Charles Quinlan had recovered against Bronson, in an action formerly brought by him in the Marine Court of the city of New York.

Upon the trial of the present action, the defendant, who denied that the Marine Court ever acquired jurisdiction of his person in the former action, offered proof on this point, and on the merits of the former action, the substance of which is fully stated in the opinion below. The court having excluded it, gave judgment for the plaintiff, and the defendant now appealed.

BY THE COURT.—CARDOZO, J.—I understand the rule to be well settled that the recital of jurisdictional facts in the judg-

ment-roll of a court of record is not conclusive. It is *prima-facie* and presumptive evidence of its truth, but may be controverted and disapproved. Therefore, when the record of a court of record asserts that process was duly served upon the defendant, the fact is presumptively and in the first instance established, but the defendant is not concluded thereby, and may prove that he was not served with process.

In Hatcher *a.* Rocheleau (18 *N. Y.*, 86, 92), Judge DENIO, speaking of a record of the Circuit Court of Adams County, in the State of Mississippi, says, "There is no ground for alleging that the record does not show jurisdiction of the defendant's person. It states that the alias summons was returned executed—that is, served; and also that the defendant appeared by attorney. This would be sufficient in the record of a court of limited jurisdiction. In a court of general jurisdiction, such as this was, it is unnecessary to prove that the defendant was served with process, or appeared in court, though the defendant is at liberty to controvert those facts."

Judge Strong, in the same case, referring to the allegations in the record, that the summons was executed by service on the defendant, and that the defendant appeared by attorney, says: "The statement of either of those facts would be sufficient evidence, in the first instance, that the person of the defendant was subject to the jurisdiction of the court."

In Hard *a.* Shipman (6 *Barb.*, 621, 624), Justice PAIGE says: "The jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. The record is never conclusive as to a recital or the statement of a jurisdictional fact; and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of the facts on which jurisdiction depends.

* * * * * * * * * *

"But the record of a court of general jurisdiction of either this or any other State in the Union, if it state facts giving the court jurisdiction, is *prima-facie* evidence to prove the jurisdiction of the court. (6 *Wend.*, 447.) And such record, when the jurisdiction of the court is established, is conclusive upon

the parties thereto, and their privies, as to every fact stated in it, except such as are jurisdictional." (See also Noyes *a.* Butler, 6 *Barb.*, 613; Harrington *a.* The People, *Ib.*, 607.)*

Therefore, even if the judgment of the Marine Court had the same effect as the judgment-roll of a court of record, the defendant Bronson was still at liberty to show that he had not been served with process, and had not appeared in the action. He made a distinct offer to show that he had not been served with process, which the court refused to allow him to do. Perhaps this offer, standing alone, unaccompanied with an offer to show that he had not appeared in the action, might be irrelevant, since it was not claimed that he had been served, but only that he had appeared by attorney.

He offered, however, subsequently, to prove that he never appeared in the action, and that he never authorized any one to appear for him. This was also objected to and excluded.

I think the exclusion of this evidence, when considered in connection with the offer to show, and the concession of the fact that the defendant had not been served with process, was error. The question of jurisdiction of the defendant's person was, as I have shown, open to evidence, even to contradict the record of a court of record. But, subsequently, the defendant was permitted to introduce certain affidavits, which had been used on a motion to open the judgment, by which it appeared that he had not been served with process, and had never appeared, or authorized an appearance for him or on his behalf. Perhaps, therefore, the error of excluding the testimony above mentioned was cured.

This question, however, remains, whether the unauthorized appearance of an attorney of the Supreme Court, for a defendant not served with process, will confer jurisdiction on the

* As to credit given to judgments of courts in other States, the case of Noyes *a.* Butler was approved in Judkins *a.* Union Mutual Ins. Co. (37 *N. H.*, 470). As to the point that no statements in the record can conclude the parties as to jurisdictional facts, it was also approved in Sears *a.* Terry (26 *Conn.*, 273).

In addition to these cases as to the effect of an unauthorized appearance, the following may be consulted. Bank of Middletown *a.* Huntington, 13 *Abbotts' Pr.*, 402; Bogardus *a.* Livingston, 9 *Ib.*, 428; Lakey *a.* Kingon, 13 *Ib.*, 192; Blodgett *a.* Conklin, 9 *How. Pr.*, 442; Sterne *a.* Bentley, 1 *Code R.*, 109; American Ins. Co. *a.* Oakley, 9 *Paige*, 496; Mallet *a.* Girard, 3 *Edw. Ch.*, 372; Keyes *a.* Moultrie, 1 *Bosw.*, 629.

Marine Court, so as to prevent the defendant from going into the merits of the original controversy, in an action on the judgment rendered by the Marine Court? That such unauthorized appearance will not confer such jurisdiction on the Marine Court must, I think, be deemed settled by authority. The Marine Court is not a court of record for all purposes, and attorneys at law, as such, belong only to courts strictly courts of record, except when otherwise expressly provided by statute. (Wheaton *a.* Fellows, 23 *Wend.*, 375; Carter *a.* Dallimore, 2 *Sandf.*, 222; Huff *a.* Knapp, 5 *N. Y.* (1 *Seld.*), 65; Lester *a.* Redmond, 6 *Hill*, 590; Ford *a.* Babcock, 1 *Den.*, 158; Fox *a.* Jackson, 8 *Barb.*, 355; Bailey *a.* Delaplaine, 1 *Sandf.*, 11.) The case of Allen *a.* Stone (10 *Barb.*, 547), cited by the respondent, does not bear on the present question. In that case, the defendant had been served with process.

It may be that the Act to reduce the several acts relating to the District Courts in the city of New York into one act, passed April 13, 1857, makes attorneys-at-law officers of those courts. (See §§ 9 and 80.) I express no opinion on that point. But be that as it may, there is no such provision in any statute respecting the Marine Court.

If, therefore, the error in excluding the defendant's offers of testimony, above mentioned, were cured by the subsequent admission of the affidavits, this judgment is still erroneous, because the defendant, not being affected by the judgment in Quinlan's suit, should have been permitted to go into the merits of the original controversy between Quinlan, and Van Schaick and Bronson, and to show, as he offered to do, that "he never wrongfully or otherwise withheld or retained any money, collected by him as attorney or otherwise, due to or belonging to Charles Quinlan."

This the court below refused to allow.

I think the judgment should be reversed.

NESSLE *a.* REESE.

Supreme Court, First District; Special Term, June, 1865.

INJUNCTION.—EQUITABLE PROTECTION OF BUSINESS SECRETS.

The courts will not, by injunction, restrain a party from the violation of a contract in which the parties have fixed and liquidated the damages for such violation.

It does not alter the case that the parties defendant are insolvent.

Trial by the court.

This was an action brought by John P. Nessle and others against Henry Reese and wife and Edgar Hudler. It appeared that Reese was the inventor or discoverer of a process for enamelling metals with porcelain, and that he with his wife assigned the right to use the process, which was theretofore a secret with them, to the plaintiffs' assignor, covenanting not to use or disclose the same under a forfeiture of $5,000, fixed as liquidated damages for every breach of this stipulation. The present action was brought to obtain an injunction restraining them from disclosing or using this process, as it was alleged they were doing or were about to do.

John E. Burrill and *H. H. Anderson*, for the plaintiffs.

Stallknecht & Hall, for the defendants.

MILLER, J.—I think that this action cannot be maintained. The agreement for the sale of the secret for compounding and applying porcelain enamel, upon which the plaintiffs' action is founded, contains a covenant that the defendants, Reese and wife, shall keep the secret, under a forfeiture of five thousand dollars, settled upon as liquidated damages, to be paid for every failure to do so.

The principle upon which courts of equity decree a specific performance of contracts is, because damages at law may not,

in a particular case, afford a complete remedy, and because of the difficulty of ascertaining the damages. (*Willard's Eq. Jur.*, 274, 278.)

In the case at bar, the parties, by fixing the amount of damages in the agreement, have provided a complete and perfect remedy, and there is no difficulty in determining what the damages are.

The damages being thus settled and liquidated, I think that the plaintiffs should be left to pursue their remedy by an action upon the agreement for damages, and are not entitled to an injunction restraining the defendants, and to equitable relief. (See *Hoffman's Provisional Remedies*, 215; Barnes *a.* McAllister, 18 *How. Pr.*, 534; Vincent *a.* King, 13 *Ib.*, 234.)

Nor does it, in my opinion, alter the case that the defendants, Reese and wife, have no property. That fact alone cannot disturb the general principle, that in case of a sum settled as liquidated damages, the parties are not usually entitled to an injunction, but must invoke their remedy at law for damages, where there is a violation of the contract. The purchaser here could have provided for such a contingency by requiring security, and it is his own fault that he has failed to do so.

These views necessarily lead to the conclusion, that the complaint must be dismissed and that the defendants are entitled to judgment.

McVICKAR *a.* KETCHUM.

New York Superior Court; At Chambers, October, 1865.

Examination of Adverse Party before Trial.

A party to an action may be examined at the instance of an adverse party at any time after advisement has been made of the nature of the claim or the defence.

Where the plaintiff applies for such an examination before the pleadings are put

in, he should be limited to such evidence as will tend to establish his cause of action; and the defendant he seeks to examine has a right to know the nature and extent of the claim, which the court will secure by requiring the service of a verified complaint before proceeding with the examination.

Order for the examination of the defendant, at the instance of the plaintiff, before trial.

This action was brought by William H. McVickar against the various persons, members of the firm of Morris Ketchum, Son & Co., and their assignees, and Augustus W. Greenleaf and others.

E. B. Ketchum, one of the defendants, was in prison upon charges of forgery, but had not yet been put upon his trial.

The plaintiff brought this action to establish his right to a considerable fund held by the defendants, Greenleaf, Norris & Co., under some contract with Ketchum, Son & Co., by E. B. Ketchum, the junior partner.

The action having been commenced by the service of summons, the plaintiffs' counsel applied, upon the following affidavit, for an order for the examination of the defendant Ketchum, before trial, and for a writ of *habeas corpus ad testificandum* to bring him from prison into court for the purpose.

[TITLE OF THE CAUSE, &c.]

"J. Larocque, being duly sworn, says: That he is one of the attorneys for the plaintiff in this action, which is in the nature of a cross-action to one already pending in this court, in which Edward Bennett and Philo C. Calhoun, as assignees of Ketchum, Son & Co., and the plaintiff herein, and all the defendants in this action, except the members composing the firm of Ketchum, Son & Co., are defendants; and that this action has been commenced by the service of the summons upon some of the defendants; that the defendant, Edward B. Ketchum, who is an adverse party to the plaintiff herein, is now confined under indictment in the City Prison in this city on charges of forgery, but not under conviction and sentence; but it is understood between the district attorney and the counsel for the said Edward B. Ketchum, as the deponent is informed and believes, that upon one day's notice to his counsel they will appear in

court and withdraw the plea of not guilty, which he has interposed, and plead guilty to at least one of the indictments against him; the doing of which is being postponed, with the sanction of the court in which the indictments are pending, as long as can conveniently be done, for the express purpose of allowing his testimony to be taken in civil suits, where it is material to avoid the technical disqualification which would result from his sentence on the criminal charge; and that if a few days' interval were required between the service of a summons and notice of his examination and the taking of his deposition, there would be danger of the plaintiff's losing the benefit of his testimony in this action, which is being allowed to parties in other actions."

The order and writ having been granted;—*F. N. Bangs*, for the defendants, upon the return-day moved to vacate them on the ground that issue had not been joined in the suit, and that no examination could be had until that was done. Such an order made before issue must be regarded as irregular. The defendants knew nothing of the cause of action. The proceeding could not be sustained as a conditional examination; for it was taken wholly under section 391 of the Code of Procedure, which says nothing about conditional examination. The order and writ should be set aside. (Chichester *a.* Livingston, 3 *Sandf.*, 718; Woods *a.* De Figanierre, 16 *Abbotts' Pr.*, 1.)

Jeremiah Larocque, for the plaintiff, suggested that the Superior Court had followed a different rule from the Supreme Court and the Court of Common Pleas in this respect, and insisted that the order was authorized by the statute, and should be sustained. It is just and reasonable that that latitude should be allowed as to the examination of parties. The presumption which exists in the case of other witnesses, that they are important, and will willingly disclose the facts at any time upon the request of either party, does not apply to parties whose interest was adverse. It is often important to have the examination, in order to know how to frame the issues in the suit; and it is no greater latitude than has always been allowed in cases of *de bene esse* examinations under the Revised Statutes, where,

immediately upon the issuing of process to commence a suit, a witness who is sick, or infirm, or going away, can at once be examined.

MONCRIEF, J.—I am of opinion that a party to an action may be examined at any time after advisement has been made of the nature of the claim or the defence. Section 391 of the Code so provides in terms, and is without qualification. The authorities cited against this view, holding that the examination could be had only after issue joined, were all cases decided prior to the year 1863.

The Legislature in that year amended section 395, by striking out the words "in respect to any matter pertinent to the issue," and deprives those authorities of the reason assigned for their conclusion.

The plaintiff should, however, be limited to such evidence as will tend to establish his alleged cause of action, and the defendant sought to be examined has the right to know the extent and nature of the claim made against the defendant. After service of a copy of a verified complaint in this action, the examination should proceed.

The application to set aside the order, &c., is denied.

BEEKMAN'S PETITION.

Supreme Court, First District; Special Term, June, 1865.

FRAUD AND LEGAL IRREGULARITY IN ASSESSMENTS.—VACATING.—POWER CONFERRED ON THREE OR MORE PERSONS.

An assessment for the *estimated* expenses of a local improvement in the city of New York, made *before* the work is done, by assessors appointed by the corporation under section 270 of the act of 1813, which contemplates an assessment of the *actual* expenses after the work is done, is not legal, and will be set aside on an application under the act of 1858.

Where a power, authority, or duty is confided by law to three or more persons

(not a court), they must all confer, unless otherwise specially authorized; and if, after entering upon proceedings, one of them resigns his appointment, the others cannot, upon a subsequent meeting, proceed with the exercise of the powers conferred.

This rule applies to assessors in street cases in the city of New York.

Petition to vacate an assessment.

James W. Beekman, the owner of one hundred and five lots, assessed for regulating and grading First Avenue from 37th to 91st streets, petitioned to have such assessment vacated under the act of April 17, 1858, upon the ground of various frauds and irregularities.

Henry H. Anderson, for the petitioner, urged the grounds of objection, among which were the following:

II. The corporation cannot lay an assessment or cause one to be laid, before the work assessed for was actually done, as it can be shown that the portion of the statute of 1813 authorizing a previous assessment has been repealed by subsequent legislation. But it is unnecessary in this proceeding to determine that question, for, if the power exists, it is necessary for certain things to be done, which have not been done; and certain things which have been done, should have been left undone, viz.:

By section 175 of the act of 1813 (*Davies' Laws*, 526), power is given to the corporation to make improvements, and to cause estimates of the expense of conforming to such regulations to be made, and a just and equitable assessment of such estimated expense to be made among the owners, &c., of lots. It is further provided that the mayor, aldermen, and commonalty shall appoint three skilful and competent persons to make every such estimate and assessment.

By section 270, the mayor, aldermen, and commonalty are authorized in all cases, where they may deem it necessary for the more speedy execution of the work, to have it done at their own expense on account of the persons respectively upon whom the same may be assessed, &c., and to levy and collect such amount, &c.

By the act of February 6, 1824 (*Davies' Laws*, 659), it is

provided that assessments for all such expenses may be made as directed in section 175 of the act of 1813.

It will be seen by reference to the ordinance under which the work in question was undertaken, that the mayor, aldermen, and commonalty deemed this work one which should be done at their own expense. As this brought the case under section 270 of the act of 1813, they did not appoint any persons to estimate such expense, nor to apportion such estimated expenses; but appointed assessors to assess the expense, when the same should actually be incurred. In this case they have acted prematurely. Their action is "*ultra vires.*" An assessment for any thing but the expense of performing the work has no authority of law, and such expense cannot be actually incurred till the work is done.

The amount stated in the assessment list is only an estimated amount, and there is no authority of law for laying any assessment for any amount estimated by any persons except such as are appointed by the mayor, aldermen, and commonalty for that purpose; and no persons have been so appointed.

On the contrary, in this case, the mayor, aldermen, and commonalty did, by the very ordinance ordering the work, elect to have the same done at their own expense, and to have such expense only (*i. e.*, the actual expense) assessed upon the owners.

This not having been done, the assessment is premature and irregular, and should be vacated.

III. But even were the assessment authorized by law, it has not been lawfully made.

It appears that an assessment-list was made out and signed October 10, 1863, by Messrs. McNeill, Oakley, and Dooley, the assessors appointed by the ordinance. This assessment-list was, in December, sent to the Board of Revision and Correction of Assessments. On the 13th day of December, 1863, while that list was before the Board of Revision, McNeill, one of the assessors, resigned, and entered upon his duties as member of Assembly.

On the 13th of January, 1864, the Board of Revision and Correction sent the assessment-list back to the two assessors remaining in office—viz., Oakley and Dooley, who under a mistaken view of the law, proceeded to add to such assessment

certain amounts, and to increase the assessment upon the lots, including those of petitioner.

This was an irregularity, and vitiated the assessment, for it is now perfectly well settled that where any three persons (not a court) are appointed to act judicially upon a public matter, they must all confer; and this rule is rigidly enforced in all cases tending to divest a man of title to his property. (Doughty *a.* Hope, 1 *Comst.*, 82; *Exp.* Rogers, 7 *Cow.*, 526; The People *a.* Walker, 23 *Barb.*, 304; Lee *a.* Parry, 4 *Denio*, 125; Sharp *a.* Johnson, 4 *Hill*, 99; The King *a.* Forrest, 3 *D. & E.*, 38; The King *a.* Inhabitants of Hamstall Ridware, *Ib.*, 380; Powell *a.* Tuttle, 3 *Comst.*, 396.*)

IV. But the amounts for which the assessment was laid are not correct amounts. They are untrue, and were known to the assessors to be so—*e. g.:*

1. The amount for advertising, $500, is shown by Allen's testimony to be incorrect. It is more than double the true amount.

2. The surveyor's fees were certified to by the street commissioner at $3,001.14. The assessors put in as his fees $6,683.97.

3. There is inserted in the assessment-list the sum of $3,457.05 as expense of assessing.

It is shown that the assessors have a salary each of $2,000 per annum (in all $6,000); and the salary of the clerk is $1,000, making $7,000 as the expense to the city per annum for assessing all assessments ordered by law.

That before this assessment was laid, there had already been assessed during the same year for assessing upwards of $10,000, so that this work actually cost nothing for assessing.

These are merely examples of the wrongs done in this assessment, and they come under both heads of frauds and irregularities.

IV. The manner of making the increase was fraudulent and irregular.

The law provides that the expense shall be assessed upon the owners, &c., in proportion to the amount their lots are benefited. It is shown that the increase was distributed, "not at all with reference to the location of property," "but only"

* See also 2 *Rev. Stat.*, 555, § 27.

with reference to finding blank spaces on the list to insert amounts "put upon all lots where the former assessments were even dollars, and space left for insertion of figures."

A more clear case of irregularity cannot well be discovered.

W. C. Trull, for the corporation.

SUTHERLAND, J.—After a very careful examination of this case, I have come to the conclusion, that the application must be granted on grounds sufficiently indicated in the 2d, 3d, 4th, and 5th points of the petitioner's counsel.

I have some doubt about the 3d point, in consequence of the special phraseology of section 16 of the act of 1859; but upon the whole, I think it well taken

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SANDS *a.* HARVEY.

Court of Appeals; March Term, 1865.

REFERENCE OF SUITS CONCERNING DISSOLVED MUTUAL INSURANCE COMPANIES.

The act of 1862 (*Laws of* 1862, 743, ch. 412),—which authorises the court to refer controversies, &c., relating to disputed or unpaid demands by receivers of Mutual Insurance Companies against members or stockholders,—applies to actions brought since the enactment of the statute, as well as to actions then pending.*

But an order granting such a reference is not appealable.

Appeal from an order of reference.

This action was brought by William G. Sands, receiver of the Ætna Insurance Company of Utica, upon a note given to the company (which was a mutual company) by Jonathan B. Harvey, the defendant.

* See the following case which holds the contrary.

The action was commenced after the company had become insolvent and dissolved, and after the passage of the act of April 21, 1862, "to facilitate the closing up of insolvent and dissolved Mutual Insurance Companies."

On motion of the plaintiff, made at special term, the action was referred to a sole referee, to hear and determine the same.

The defendant appealed from the order made at the special term, upon the sole ground that the action was not referable, when the order of the special term was affirmed.

That decision was made at general term, in the sixth judicial district,* and from it the present appeal was taken.

George W. Sumner, for the appellant.—I. The peculiar phraseology of the act of 1862, p. 743, was evidently designed to provide for a summary disposition of a controversy between the receiver and a member of an insurance company, without an action, and does not contemplate a compulsory reference of an action which a receiver should thereafter elect to commence in any court.

1. The first section, authorizing a reference of a controversy or disagreement, or of a "demand or claim," after personal demand, or refusal or neglect to pay, contains no apt language to include suit or action, and was not intended to, as is manifest by the 5th section of the same act, which provides that "the Supreme Court shall have power to refer all actions now pending therein, wherein any such receiver is a party."

2. If the plaintiff's construction be correct, then the action can be referred only by a justice of the Supreme Court, whether brought in that court or in the Superior Court, or even in a justice's court; and by section 2, whenever commenced the result is to be a judgment of the Supreme Court.

3. By the 2d section the referee is to proceed in a summary manner, upon written or oral pleadings, and have the same powers as if appointed by the Supreme Court in actions, the judgment is to be the judgment of said court in the same manner. On appeal, only that court can set aside the report; and

* Present, W. W. Campbell, P. J., John M. Parker, Charles Mason, and R. Balcom, JJ. No written opinion was delivered.

by the same section peculiar restrictions are placed upon the right of appeal.

4. By section 3, the controversy is to be brought to a hearing upon notice, the same as required by the practice of the Supreme Court, which is a useless provision if an action was contemplated.

5. If an action is within the intention of the first four sections, then it follows that a receiver, after electing to commence an action, may by reason of a change of venue, or for any other caprice, elect not to continue it in court, to be governed by ordinary legal rules, but to reduce his action to a mere controversy, governed by no rules.

6. By the 4th section, the referee, as to commissions to examine witnesses, becomes, or is to act as a justice's court; so that these actions now pending in the court, if the orders of reference stand, lose, for a while at least, their character as actions, and have no standing in any court: but on the subject of commissions they again appear in court, but this time in the character of justice's court actions; and in case of an appeal they reappear at the general term, irrespective of the court wherein they were commenced.

7. By section 5, the Supreme Court is limited, in the power given to refer actions, to such as were pending therein at the time of the enactment.

8. The application to refer, under the first section, can only be made to a justice of the Supreme Court, and not to the court, as was attempted in this case; and under the 5th section, the application must be to the Supreme Court, and then only to refer actions then pending in that court.

II. These actions were not referable under the Code, section 271.

As this action was not pending until after the act of April 21, 1862, became a law, the order of reference should be reversed, with costs.

Henry R. Mygatt, for the respondent.—This action is referable under the act of April 21, 1862.

The motion was to the court for a reference. In Sands, receiver, *a.* Kimbark and others, executors, the proceeding was commenced under the act "to facilitate the closing up of in-

solvent and dissolved Mutual Insurance Companies," passed April 21, 1862. (39 *Barb.*, 108.)

The act was declared constitutional, and on appeal the affirmance by this court was concurred in by all the judges.

In this court, by MARVIN, J. "The proceedings were instituted before the Supreme Court by a notice, in pursuance of the statute; and the referee was appointed by the court, or a justice thereof. The proceeding under the statute is in the Supreme Court."

1st. Statutes are construed according to their meaning. When by section 1 of the act of April 21, 1862, the Legislature said, "if any controversy or disagreement shall arise between the receiver of an insolvent or dissolved Mutual Insurance Company, in the settlement of any demand or claim against any member or stockholder of the company of which he is receiver," . . . . or if after personal demand for payment of such demand or claim shall have been made, and the payment of the sum claimed be neglected or refused, ... the same may be referred," the Legislature thereby intended that all of this class of cases should be referred.

The words of this statute are not obscure. The intention is manifest. Even if the act was obscure, the intention of the Legislature would be resorted to. And that intention is manifest from the title of the act, "to facilitate the closing up" of these companies.

The object was to create a tribunal where these cases could be speedily tried, and the creditors receive their long-delayed claims.

The intention of the makers is most clear; and that intention, according to well-settled principles, controls the meaning. (People *a.* Utica Ins. Co., 15 *Johns.*, 358; *Plowden*, 18, 88; 2 *Institutes*, 64; James *a.* Patten, 6 *N. Y.* (2 *Seld.*), 9.)

The intention is gathered from the occasion and necessity of the law; the defect of the former law and the designed remedies, being the causes which moved the Legislature to enact it. (*Dwarris on Statutes*, 562; Pillow *a.* Bushnell, 5 *Barb.*, 156.)

2d. The statute provided not only for a reference of all cases thereafter to be prosecuted, but also of "all actions now pending therein."

As the intention of the lawgiver is to be deduced from a view of the whole and every part of a statute taken and compared together, it is evident that the real intention of the Legislature was to refer and facilitate the settlement of all the controversies of these companies, whether then pending or thereafter to be brought.

Section 5 of the act is as follows: "The Supreme Court shall have power to refer all actions now pending therein, wherein any such receiver is a party; and where any controversy arises, as mentioned in the first section of this act, such reference shall in no way prejudice the proceedings already had."

It provides not only for a "reference of actions now pending"—that is, pending when the act took effect—but for the reference of "any controversy that might thereafter arise, as mentioned in the first section of this act;" and also provided that such reference should not "prejudice the proceeding already had;" thereby most clearly meaning that in actions thereafter brought in the Supreme Court in this class of cases, a reference might be had as provided in section 1, and that without prejudice to the proceedings already had.

In Bangs, receiver, *a.* Barto (24 *How. Pr.*, 487), the court by MARVIN, J., in reference to this act, say: "The Supreme Court has power to refer actions pending, when the parties to the action and the controversy are such as are specified in the first section of the act. This is so provided by the fifth section."

3d. Before the act of April 21, 1862, proceedings of a like nature to the act in question were the laws of the land, prior to the Constitution of 1822, as well as under the Revised Statutes of 1830, and so continued until this day.

By the Revised Laws of 1813, "all matters and accounts between such absconding and concealed debtor and his debtors or creditors, his trustees were authorized to settle." (1 *R. L.*, 1813, 161, § 15.)

And referees were nominated and appointed for that purpose. (*Ib.*, 161, § 16.)

4th. The reference of claims due insurance companies is authorized in the same manner, and by the same statute, as the reference of all claims due to or from any bank or other insolvent corporation.

First. The term moneyed corporations applies, the same to insurance companies as to banks. "The term 'moneyed corporation,' as used in this title, shall be construed to mean every corporation having banking powers, or authorized by law to make insurances." (1 *Rev. Stat.*, 599, § 51; 2 *Ib.*, 5 ed., 526, § 54.)

Second. Equity proceedings against insurance companies are the same as against banks. The statute declares, that "whenever any corporation having banking powers, or authorized by law to make insurances, shall become insolvent," the same shall be restrained from exercising any of its corporate rights, privileges, or franchises. (2 *Rev. Stat.*, 464, § 39; 3 *Ib.*, 5 ed., 764, § 47.)

Third. The Revised Statutes declare that "such receivers" (referring to receivers of insolvent corporations) "shall have the power to settle any controversy that shall arise between them and any debtors or creditors of such corporations, by a reference, as is by law given to the trustees of insolvent debtors." (2 *Rev. Stat.*, 470, § 80; 3 *Ib.*, 5 ed., 770, § 54.

And the same proceedings for that purpose shall be had, and with the like effect. (*Ib.*)

Fourth. "If any controversy shall arise between the trustees (of an insolvent debtor) and any other person, in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to three indifferent persons," to be agreed upon. (2 *Rev. Stat.*, 45, § 19; 3 *Ib.*, 5 ed., 118, § 21.)

If said referees are not selected by agreement, then they are to be appointed on ten days' notice to the officer making the appointment of said trustees. (2 *Rev. Stat.*, 45, § 20; 3 *Ib.*, 5 ed., 118, § 22.)

Fifth. By the act in question, the reference is retained, and the sole referee is adopted. The act assimilates to the sections of the act directing compulsory references in controversies with the trustees of insolvent debtors.

In the case before cited, of Sands, receiver, *a.* Kimbark *et al.*, in 29 Barb., 108, the Supreme Court at general term, opinion by Mr. Justice CAMPBELL, express the view that the act in question neither confers nor attempts to confer "any new equity jurisdiction;" and the court, at page 122, says, "Other reasons

than those given might be stated; especially the proceedings in the cases of the insolvency of individuals might be referred to as showing compulsory references prior to the Constitution of 1846."

It seems, therefore, that under the laws existing before the one in question, this action would have been referred to three referees, instead of the one as now allowed.

It is, however, sufficient that the act in question authorizes the reference to a sole referee.

By the Court.—Campbell, J.—The action in this case was commenced after the passage of the act of 21st April, 1862, being "An Act to Facilitate the Closing up of Insolvent and Dissolved Mutual Insurance Companies." The objection at first raised against the act, that it was unconstitutional, or it impaired or took away the right of trial by jury, has been disposed of in this court. The constitutionality of the law has been upheld. (Sands *a.* Kimbark, 27 *N. Y.*, 147. To the same effect was Sands *a.* Tillinghast, 24 *How. Pr.*, 435.)

The 5th section of the act provides, that all actions then pending in the Supreme Court at the time of the passage of the act might be referred by the court. The first section provides that if any controversy or disagreement shall arise between the receiver of an insolvent or dissolved mutual insurance company, in the settlement of any claim against any member or any other person, "the same may be referred to a sole referee"—that is, any controversy or disagreement which may arise between the receiver and a member or other person may be referred. Surely, where an action has been commenced by the receiver, and an answer has been put in denying the receiver's right to recover, a controversy has arisen both within the letter and the spirit of the act. The act provides that applications may be made for the appointment of a referee to a justice of the Supreme Court residing in the district where the receiver keeps his office. In this case, the order was made by such justice, but he was holding a special term of the court at the time. If the order could have been made by the justice at chambers, it would be difficult to see why he could not make it at a special term then being held at his chambers. But this controversy, at the time the order of reference was made, had

assumed the form of an action, and the action was then pending in the Supreme Court, which made it eminently proper that the order of reference should be made in court.

I am unable to see that any error was committed.

But the court are of opinion that the order was not appealable, and the appeal is dismissed, with costs.

SANDS *a.* BIRCH.

Supreme Court, Fourth District; General Term, July, 1865.

REFERENCE OF SUITS CONCERNING DISSOLVED MUTUAL INSURANCE COMPANIES.

The act of 1862 (*Laws of* 1862, 743, ch. 412),—which authorizes the court to refer controversies, &c., relating to disputed or unpaid demands by receivers of mutual insurance companies against members or stockholders,—does not apply to actions brought since the enactment of the statute.*

Appeal from an order of reference.

This action was similar to that of Sands *a.* Harvey, above reported (*Ante*, 248), and was also commenced after the act of 1862.

It came before the general term of the Fourth district, upon an appeal from a similar order of reference.

Vandenburgh and *Heath*, for the appellants.

Henry R. Mygatt, for the respondent.

BY THE COURT.—BOCKES, J.—This is an appeal from an order appointing a referee to hear and determine the action. The order of reference was made by authority of the act of 1862 (*Session Laws*, 743, ch. 412); and it is conceded that the action

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* See, to the contrary, the preceding case.

was not referable except under the provisions of that act. This action was commenced subsequent to the passage of the law of 1862, and it is insisted that no provision is there made for referring such actions.

At the October general term of this court, in 1864, we held that the statute under which the reference was ordered, had no application to actions commenced by the receiver after the passage of the law; that the act of 1862 applied only to the settlement of controversies without action, and to pending suits. On the argument of this appeal at the last May term, it was stated that our decision at the October term had been overruled by the Court of Appeals, in Sands, receiver, &c., against Harvey, decided in the latter court in April last, and the remittitur was handed us in proof of the statement. So it was insisted that the ruling of the Supreme Court in the sixth district, counter to the decision in this district (4th) in October, had been affirmed on appeal by the Court of Appeals.

On inquiry it is found, however, that the Court of Appeals did not pass on the question then and now under consideration. The order in Sands, receiver, *a.* Harvey was not affirmed by the Court of Appeals on the merits, as would seem to be the case from an inspection of the remittitur; but the appeal was dismissed. The opinion on file in the Court of Appeals was written by Mr. Justice CAMPBELL, who, after considering the case on the merits, and arriving at the conclusion that the order was right and should be affirmed, adds: "But the court are of the opinion that the order was not appealable; and the appeal is dismissed, with costs." Whether any member of the court concurred with Mr. Justice CAMPBELL in his construction of the act of 1862, does not appear. All that was decided in the case was, that the order was not appealable to the Court of Appeals. Thus, it seems, our decision made at the October term, 1864, has not been reversed or overruled by the appellate court. True, our ruling upon the construction of the act of 1862, is adverse to that of the court in the sixth district; but while we entertain the highest respect for the opinions of the learned justices who compose the bench in that district, we must, after careful consideration of the question before us, still adhere to our former ruling.

The object of the act of 1862, as its title declares, was to

facilitate the closing up of insolvent and dissolved mutual insurance companies. It was evidently supposed that this end could be attained without the usual formula and delays attendant upon a course of litigation, conducted in accordance with the general practice of the courts. A system or theory of proceeding was therefore devised, by pursuing which, and avoiding the necessity of instituting further suits in the usual form, all matters in controversy relating to the receiver's business could be speedily and cheaply adjusted. This system being adopted, further suits were unnecessary therefor, inasmuch as it was supposed that no new actions would be instituted. No new provision was made for their conduct or determination; but the parties were left to the general practice of the courts in those suits which the receiver should elect thereafter to bring, instead of adopting the system which had for its purpose a more speedy adjustment of controversies. A law was consequently devised and adopted, providing for the determination and settlement, without suit, of demands and claims which had not been sued, and for the speedy determination of pending suits. Its provisions in this view covered every possible case existing at the time of the passage of the law, without extending its application to actions thereafter to be brought, for the bringing of which no necessity would thereafter exist. So the first four sections of the act under consideration contemplate compulsory references of controversies without action; controversies as to which no suit had been instituted. These sections should be read and construed together, and present the scheme for speedy disposition of controversies relating to the receiver's business. They provide for an immediate reference of the subject-matter in dispute, and direct the mode of proceeding to judgment without action. Then follows the fifth section, which authorizes and empowers the court to refer all actions pending therein. If the four preceding sections were intended to embrace any controversy between the receiver and others relating to his business as receiver, whatever might be its condition, then the fifth section was quite superfluous; for without this section, according to the construction claimed for this act in regard to suits thereafter to be commenced, there would be ample authority in the court to direct a reference. The preceding four sections apply as aptly to claims and demands then in suit, as

to those on which suits should be thereafter brought. I think it plain that the first four sections were intended to embrace every case of controversy except those in suit; and the fifth was intended to cover and make provision for the latter class. No allusion is anywhere made in direct terms to actions thereafter to be commenced, and for the reason probably that no proceeding by action would be necessary after the passage of the act. This law, however, did not take away the right to proceed by action, and the receiver was left to his option to take a reference under the provisions of the act, or bring his suit in court. In case he should adopt the latter course, he could claim nothing by the law under examination, but must look to the general rules of practice for guidance in pursuing the remedy of his own selection.

We are of the opinion that the order of reference is without the sanction of law, and should be reversed.

Order accordingly.

CARPENTER *a.* BELL.

New York Superior Court; General Term, November, 1863.

PLEADING.—DEFENCES.—RELEVANCY.

In an action to recover moneys alleged to be due to the plaintiff from the defendant, a defence alleging that a third person had given defendant notice that he was owner of such moneys, and of any cause of action therefor, and demanded payment to himself, by virtue of an assignment from the plaintiff, is irrelevant.

A defence setting forth supplementary proceedings taken against the plaintiff by a judgment creditor, in which the plaintiff and the defendant had been forbidden to transfer, dispose of, or interfere with the property of the plaintiff, is not irrelevant.

If the allegations of a defence are pertinent to the controversy, their sufficiency is only to be tested by demurrer or on the trial.

A defence set up in an original answer, is not to be struck out as irrelevant, merely because the matter of it arose after suit brought.

Appeal from an order striking out the third and fourth defences from the defendants' answer.

The action was brought against William J. Bell, Robert Courtney, and Samuel A. Hill, to recover from them $8,200, alleged to be due to the plaintiff from them, for stock sold by them as his brokers.

The answer of the defendants admitted that there was a balance of $5,528.70 due from them, upon the transactions stated in the complaint. For the third and fourth defences it alleged, "3. That on or about the 12th day of June, 1862, one Nathaniel A. Cowdrey duly recovered in this court a judgment against the plaintiff in this action, for the sum of $1,401.99; which judgment was duly docketed, and a transcript thereof filed in the office of the clerk of the city and county of New York; that thereupon said Cowdrey duly issued an execution, to collect the amount of the said judgment, to the plaintiff of the said city and county, within which county the said Jacob Carpenter then resided, or had a place of business; that the said execution was, sixty days after the issue thereof, returned by the said sheriff wholly unsatisfied; that thereupon afterwards, and on the 9th day of September, 1863, it was made to appear, on behalf of the said Cowdrey, to the Honorable Joseph S. Bosworth, chief-justice of this court, that said judgment had been recovered, and the said execution issued and returned as aforesaid, and that the said judgment was still wholly unsatisfied, and that the said Carpenter still resided within the city and county of New York; and, further, that these defendants were indebted to the said Carpenter, or had property of his in their possession, to an amount exceeding ten dollars; whereupon the said chief-justice, on the said 9th day of September, 1863, duly made an order, requiring these defendants and the said Carpenter to appear and answer on oath concerning the property of said Carpenter, at the chambers of the said court before the said chief-justice, at a time specified by the said chief-justice in the said order; and forbidding these defendants and the said Carpenter to make any transfer or other disposition of, or any interference with, the property of the said Carpenter; of which said order these defendants and the said Carpenter, as these defendants are in-

formed, had due notice; and the said order still remains in force. Whereby, as these defendants are informed and believe, the said Cowdrey acquired a specific lien upon the demand set forth in the complaint in this cause, and became solely entitled to collect the same, and reduce the same to possession; and that the right of action of the said plaintiff for the same, or any part thereof, was and is wholly suspended.

"4. And these defendants, further answering, show to the court, that on the 10th day of September, 1863, one George W. Markham, of the city of New York, caused to be served on these defendants a notice, that he, said Markham, was the owner of the moneys for the recovery of which this action is brought; and also of any and all causes of action the said plaintiff may have against these defendants; and notifying these defendants to pay over such moneys to him, or his authorized attorney, and to no other person; as he is the owner of the same, by virtue of a sale and assignment to him by said plaintiff, Jacob Carpenter."

These defences the plaintiff moved to strike out as irrelevant and frivolous, and also that Markham be substituted as plaintiff.

The motion was heard before Mr. Justice BARBOUR, at a special term, October, 1, 1863, who granted it as to the pleading, without prejudice to the defendants moving for leave to file a supplemental complaint setting up the same matters.

From this order the defendants appealed.

Samuel G. Courtney, for the defendants, appellants.—I. The order should be reversed. The "third" and "fourth" defences are well pleaded.

1. The alleged matters could not be taken advantage of except by answer. (*Code of Pro.*, §§ 144, 147, 148, 150, subd. 2.)

2. The "third" defence is an equitable as well as legal one.

3. The fourth defence existed at the time the answer was put in, and was properly pleaded.

4. Although the plaintiff in this motion asked for substitution of Markham as plaintiff, he waived that on the argument; and, therefore, as the case stood at the time the answer was put in, and as it stands now, the fourth defence was, and is, properly pleaded.

II. It is not the rule that any matter arising after the com-

mencement of the action, and before answer, cannot be pleaded, except by special leave of the court. The Code intended that any defence existing at the time the defendant answers, can be set up by way of answer. (See *Code*, §§ 150, 177; Willis *a.* Chipp, 9 *How.*, 568; Williams *a.* Hernon, 16 *Abbotts' Pr.*, 178.)

III. The plaintiff could not, under the third defence, make this motion.

1. The plaintiff was forbidden by the order referred to, in defence "third," from making any transfer or other disposition, or any interference with his property.

2. Such a motion is a direct violation of the said order, and a contempt in the presence of the court making said order.

A. R. Dyett, for the plaintiff, respondent.—I. The matter pleaded arose after commencement of suit, and could only be pleaded by way of supplemental answer by leave of the court. (*Code*, § 177.)

II. The matter was only a partial defence, and a defence must be to the whole cause of action.

III. The defences at best were "transfers of interest" after suit commenced. (*Code*, § 121.)

They were not defences to the action, any more than they would have been before the Code.

IV. The supplementary order set up created at best but an inchoate lien in the creditor. No final order had been made. Could the court at *nisi prius* direct a verdict for the defendants on those issues? Clearly not, and therefore it is no defence.

V. The defendants are not without remedy. The proper course was for the defendants to go on and try the action, and if a recovery was had, to apply to the court by motion to stay the collection of the judgment until the supplementary proceedings were at an end, or they might be relieved under section 122 of the Code.

VI. But the supplementary order has since been vacated and set aside, and the court ought not to entertain this appeal.

By the Court.*—Bosworth, C. J.—Appeal by the defend-

* Present—Bosworth, Ch. J., White and Monell, JJ.

ants from an order, dated October 1, 1863, striking out the defences marked *third* and *fourth* as irrelevant and frivolous.

There is no provision in the Code authorizing a defence to be stricken out as frivolous. Sham and irrelevant answers and defences may be stricken out. (*Code*, § 152.) A plaintiff may demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and a plaintiff may demur to one or more of such defences. (*Ib.*, § 153.) If an answer be frivolous, the plaintiff may move for judgment on that ground. (*Ib.*, § 247.) If the motion be granted, the answer is not stricken out, but remains on the record. (Briggs *a.* Bergen, 23 *N. Y.*, 162.)

The order can be upheld, if these defences are irrelevant, but not otherwise. A defence is irrevelant which has no substantial relation to the controversy between the parties to the action. Kurtz *a.* McGuire (5 *Duer*, 660) is an illustration.

The allegations constituting the defence marked *fourth*, even if true, have no substantial relation to the controversy between the parties. They do not tend to show any averment of the complaint to be untrue, nor present any ground for denying to plaintiff a recovery of the whole amount claimed. Any mere notice that third persons may have given to the defendant is wholly extraneous to the controversy, and is clearly irrelevant.

The allegations forming the *third* defence are pertinent to the controversy, unless their effect be avoided by facts not appearing on the record: they show, *prima facie*, that N. A. Cowdrey has acquired a lien on the amount due from the defendant to the plaintiff to the extent of the amount of his judgment. But until an order is made that the defendant pay such amount to Mr. Cowdrey, his right to receive it from the defendants is not absolute. The defendants and Carpenter are enjoined from making "any transfer, or any other disposition of, or interference with the property of said Carpenter," assuming the order to be correctly described in the answer.

Whether this does or does not interfere with the plaintiff's and defendants' right to litigate the suit, and determine by verdict the extent of the defendants' liability, need not be now decided. If an order to pay Cowdrey shall then have been made and be in force when a verdict shall be rendered, it will protect and prohibit the defendants from paying *pro tanto*, to

Carpenter. That there are not enough allegations to make a perfect partial defence, may render it demurrable, but does not make it irrelevant. The allegations are relevant or pertinent, but insufficient, perhaps, to constitute a defence. Whether they constitute a defence, must be determined upon a demurrer to this defence, or at the trial.

As to the suggestion that the facts constituting this defence arose since suit brought, and can only be set up in a supplemental answer on leave of the court first had; it may be replied, that no answer had been put in prior to the one in question. There is no answer to which a supplemental one can be made. The defence is none the less relevant, even if it be true that the answer is irregular, because put in without leave of the court. All that can be said in that view of the law is, that the answer was interposed irregularly, but not that the matter in it is, for that reason, irrelevant.

There is another answer to the suggestion. In actions at law, prior to the Code, a defendant could plead, as a matter of course and of right, any defence arising after suit brought, and before the time to plead had expired. But instead of being plead in bar, it was plead to the further maintenance of the suit. (Covell *a.* Weston, 20 *Johns.*, 414; Boyd *a.* Weeks, 2 *Den.*, 321–322; 2 *Chitty Pl.*, 906, 913.) This, however, was a matter of form, rather than of substance. If true and sufficient, it prevented a recovery by the plaintiff.

The same rule obtained in the Court of Chancery. A defendant could state in his answer matter arising before it was put in, and after suit brought. (Lyon *a.* Brooks, 2 *Edw. Ch.*, 110.)

The question, in cases arising under the Code, was decided the same way by an able judge, in Willis *a.* Chipp (9 *How. Pr.*, 568). No adverse decision has been cited. The defence could not be struck out as irrelevant, merely because it arose after suit brought.

It was discretionary with the judge to refuse to permit Markham to be substituted as plaintiff.

So much of the order as strikes out the *third defence* as irrelevant, should be reversed; in other respects it should be affirmed, without costs to either party.

PIGNOLET *a.* GEER.

New York Superior Court; General Term, March, 1863.

SET-OFF.—FORMER ADJUDICATION.

The denial of a motion to set off judgments is not a bar to an action to compel such set-off.

A debt absolutely assigned to a stranger, pending litigation thereon, and before judgment, cannot, on a motion, be set off against another debt. But in an action such set-off may be allowed.

At law, set-offs are regulated and controlled by the statute, and both demands must be liquidated by judgment, before a set-off can be heard. But in equity, the statute does not control, and the demands need not be liquidated.

Appeal from an order denying a motion for leave to serve an amended complaint; and also for leave to renew a motion for an injunction; and also for an injunction restraining the collection of a judgment in favor of the defendant, Darius Geer, against the plaintiff; and also for leave to make Elias S. Young and James A. Ruthven parties defendants to the action.

The amended complaint, upon which, in part, the motion at special term was founded, alleged that an action was commenced in this court, by the defendant Darius Geer, against the plaintiff, to recover a debt due to Geer, on the 6th of March, 1854; that on the 12th of April, 1855, the plaintiff in that suit recovered a judgment for $761.81; that an appeal was taken thereupon to the general term of this court, where the judgment was affirmed on the 26th February, 1856, and judgment had for costs of the appeal, amounting to $80.26; that the defendant in the judgment appealed to the Court of Appeals, where the judgment was affirmed on the 11th of December, 1858, with costs amounting to $220.33: that the costs of the two appeals were paid to Messrs. Young & Ruthven, who were the plaintiff's attorneys in said suit, but that no part of the judgment for $761.81 had been paid; that the cause of ac-

tion upon which that judgment was recovered, was for work done and materials furnished in erecting a store for the defendant in said suit, in the year 1853, and January, 1854, and that the whole contract price was allowed the plaintiff in that suit; that one Consall did the painting on said building; and that the defendant was indebted to him therefor on the 3d of January, 1854, for which he (Consall) brought suit and recovered judgment on the 28th January, 1856, for $182.31, which had never been paid; that on the 9th of June, 1853, the said defendant was in debt to one Baxter for lumber furnished, upon which he (Baxter) recovered judgment against the said defendant on the 13th of February, 1855, for $546.95, which had never been paid.

The amended complaint further alleged that the last two judgments were, on the 11th of February, 1856, duly assigned to the plaintiff in this action; are in full force and effect, and wholly unsatisfied; and that at that time, and for a long time afterwards, the plaintiff believed that the said judgment against him belonged to the said defendant, Darius Geer, and was ignorant that any other person claimed the same, in whole or in part. That previous to the year 1855, the said Darius Geer became insolvent, and has since continued insolvent.

That the defendant Darius W. Geer, who is a son of Darius Geer, claims to have some interest in the said judgment against the plaintiff; but the plaintiff claims that such right, if any, is subordinate to the right of the plaintiff to have the judgment assigned to him set off against said first-mentioned judgment.

That Young & Ruthven, whom the plaintiff seeks to bring in as parties, also claim some interest in said judgment, but which the plaintiff alleges is subordinate to his aforesaid right of set-off. There were also allegations tending to show that Darius W. Geer gave directions to the attorneys prosecuting the action, prior to obtaining judgment thereon.

The amended complaint further alleged that an execution had been issued upon said judgment against the plaintiff, and is in the hands of the sheriff.

The complaint demanded that the two judgments assigned to the plaintiff might be set-off against the judgment recovered against him by the defendant Darius Geer, and that the de-

fendants might be restrained from taking any proceedings to collect the last-mentioned judgment.

It appeared, in opposition to the motion, that, on the 26th of September, 1854, and before the recovery of the judgment against the plaintiff, the defendant Darius Geer assigned the claim to the defendant Darius W. Geer, for a valuable consideration, who thereafter became the owner of the same, and of the judgment subsequently recovered against the plaintiff. That in January, 1859, a motion was made by the plaintiff, at a special term of this court, to set off these judgments, which was denied. The order was subsequently affirmed by the general term, and afterwards an appeal therefrom was dismissed by the Court of Appeals.

That in November, 1862, a preliminary injunction was granted in this action, which, on the first of December last, was dissolved, upon notice to the plaintiff, at a special term, from which decision no appeal was taken, nor was any leave given to renew the motion.

It further appeared that proceedings supplementary to the executions upon the judgments assigned to the plaintiff had been instituted, and a receiver appointed therein, whereby whatever interest the defendant Darius Geer had in the judgment against the plaintiff was vested in the receiver.

It did not appear that the judgment against the plaintiff had ever been assigned to Darius W. Geer.

The justice before whom the motion was made at the special term held that the decision of the Court of Appeals, upon appeal from an order of the general term of this court, denying, in effect, the plaintiff's motion to set off his two judgments against the judgment which had been obtained against Geer, senior, must be taken as a full and final determination of the rights of the plaintiff upon the one side, and Geer, junior, on the other, as owners of the judgments held by them respectively, and that this court was, therefore, virtually precluded from granting the relief prayed for in the amended complaint, upon the case now made; and even if this were otherwise, he was of opinion that the debts were unliquidated claims at the time of the transfer to the younger Geer, and not the subject of set-off.

From the order entered upon his decision, the plaintiff now appealed.

A. J. Willard, for plaintiff, appellant.

J. A. Ruthven, for defendant, respondent.

By the Court.*—Monell, J.—The only facts which we think can be considered on this appeal, as affecting the decision of the motion at special term, are, that a motion has already been made in this court to set off these judgments, which was denied, and that a motion for an injunction in this action has also been denied. So far as any questions arise upon the denial in the opposing papers, of the equities of the plaintiff's case, we are of opinion that such questions should not be disposed of upon a motion, but that the parties should be allowed to sustain their respective allegations by proof at the trial.

The learned justice who decided the motion at special term was of opinion that the decision of the motion in this court, to set off these judgments, was a final determination of the rights of the parties, and that, therefore, the court was precluded from granting the relief demanded by the plaintiff in his amended complaint. This view, we think, was erroneous.

Where one debt is absolutely assigned to a stranger, pending the litigation, and before it is liquidated by a final judgment, the same cannot be set off against the other on a motion. (Gay *a.* Gay, 10 *Paige*, 369.) And in Barber *a.* Spencer (11 *Id.*, 517), the chancellor says: "The right of set-off, upon a summary application to a court of law or equity, exists only in cases where the debts on both sides are liquidated by judgment or decree, before the assignment of either to a third person." It is presumed that the decision of the motion, both in this court and the Court of Appeals, was upon the authority of the cases cited and others sustaining the same doctrine. But a court of equity, in an action brought for the purpose, may allow a set-off, where the equitable right to such set-off existed before the assignment to a third person, notwithstanding neither of the demands had at that time been liquidated by judgment or decree. (Cases *supra*, and Ainslie *a.* Boynton, 2 *Barb. S. C.*, 258; Bradley *a.* Angel, 3 *Comst.*, 475.)

* Present, Moncrief and Monell, JJ.

A right of set-off at law is regulated and controlled by the statute, and hence, a court of law, or even a court of equity, upon a summary application, can allow the set-off only in those cases authorized by the statute. But in an action brought for a set-off, the right of set-off does not always depend upon the statute, nor upon the question whether both demands are liquidated by judgment. In Gay *a.* Gay (*supra*), the chancellor says: "If an equitable right of set-off exists, while the parties have mutual demands against each other, because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law, or in equity, to recover the same, this court, upon a bill filed, will compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed, is a sufficient ground for the exercise of the jurisdiction of the Court of Chancery, in allowing a set-off in cases not provided for by the statute, although the demands on both sides are not liquidated by judgment or decree, so as to authorize a set-off upon a summary application, by motion." Bradley *a.* Angel, and Ainslie *a.* Boyton (*supra*), are to the same effect.

The decision, therefore, of the motion refusing to allow the set-off, does not preclude the party from obtaining the relief in an action, and he has the right, notwithstanding the denial of the motion, to bring his action upon the equity side of the court, to compel an equitable set-off.

The amended complaint alleges that David Geer became insolvent prior to 1855, and has since continued insolvent. That when he, the plaintiff, took the assignment of the two judgments he seeks to set off, he believed that the judgment against himself belonged to said Geer, and was ignorant that any other person claimed the same, or any part of it. It is further alleged that the claim of the defendant Darius W. Geer, and of Young & Ruthven, to the said judgment, or to some interest in it, is subordinate to the right of the plaintiff to set-off said judgments.

Whether these allegations are sufficient, or whether the proof, upon the trial of the action, will sustain the right of the plaintiff to compel the set-off, are questions which, we think, should not have been determined upon this motion, but should have

been left to be decided at the trial. It is for such reason that we do not feel at liberty to consider the affidavits used by the defendants in opposition to the motion at special term. They show a strong defence to the action, but the plaintiff may, nevertheless, be able to establish on the trial, and to satisfy the court, that he is entitled to the equitable relief he asks for.

For these reasons, we think the plaintiff should have been allowed to serve his amended complaint, and to bring in Young & Ruthven and make them parties defendants in the action.

As the case made by the amended complaint, *prima facie*, is sufficient to authorize the court to compel the set-off of the judgments; and as the judgment compelling such set-off might be ineffectual unless the defendants were restrained from collecting the judgment against the plaintiff, the injunction asked for by the plaintiff should have been granted.

The order appealed from should be reversed.

ANN DOYLE'S CASE.

Supreme Court, First District; At Chambers, October, 1865.

COMMITMENT IN DEFAULT OF SURETIES.

Under the statutes authorising the binding over of disorderly persons to keep the peace, the magistrate has power to commit such a person until sureties are given.

Habeas Corpus.

The relator having been committed to jail for disorderly conduct until she should give security to keep the peace, procured a writ of *habeas corpus* to test the question if such a commitment was valid.

Mr. Barnaby, in support of the writ, insisted that the com-

mitment was for an indefinite period, and in analogy with the rulings of the courts on other indefinite commitments was void.

INGRAHAM, J.—The prisoner is brought before me on *habeas corpus*, and her discharge is asked for on the ground that the commitment by the magistrate, until she gave bail for her good behavior, was unauthorized by law. I do not deem it necessary to place the decision of this matter on the ground that where the judge has authority to require a party to give bonds for her good behavior, it necessarily includes the power to hold her in custody until such security is given. The contrary construction would render nugatory the whole provision of the statute which authorizes the magistrate to arrest and to require the security to be given. If, when the prisoner charged with disorderly conduct is brought before the justice, and he finds her guilty and orders her to give the security, she can reply that she will not give the security, and may insist upon being discharged without it, the whole proceeding will be ridiculous. I cannot suppose there was any such course of proceeding contemplated: on the contrary, the prisoner, when brought before the justice, is in custody; she is to be discharged from custody on giving security, and not before. It is immaterial whether such imprisonment is continued in the police-office before the justice, or in the prison under a commitment from the justice. At common law, the magistrate had authority to arrest and require sureties for the peace or good behavior, and in case of not giving such security the prisoner might be committed to prison until such security was furnished. (1 *Hawk. P. C.*, ch. 60, 5, 9.) And the justice might in the first instance issue his warrant to the officer, directing him to cause the party to go before some justice to find surety, and, if he shall refuse, convey him directly to prison. (*Ib.*, 5, 12.) This common-law power is modified by the Revised Statutes (2 *Rev. Stat.*, 705, § 14), by providing that no security to keep the peace, or to be of good behavior, shall be required, nor shall any person be committed to prison for not giving the same, in any case except such as are prescribed or authorized by statute. While this limits the common-law right of the magistrate to require sureties of the peace for good behavior in any case before him at his discretion, to cases

in which such authority is conferred by statute, I do not understand it in any way as depriving him of the common-law authority to commit for not giving such security in cases so provided for. On the contrary, the exception of cases provided for by statute, leaving the power to commit in such cases for not giving such security, remains in full force. The provisions of the Revised Statutes (vol. 2, marg. p. 704), contained in sections 1–5, regulate the mode of taking sureties to keep the peace; and the 5th section provides, in case of refusal to give sureties, for the commitment of the person charged. The provisions of Revised Statutes (vol. 2, marg. p. 709), makes imilar provisions in case of disorderly persons, and authorize the making of a record of the conviction of such disorderly persons in default of sureties, and the committal of the offender until such sureties be found. The act of 1833, ch. 11, p. 9, sect. 8, under which this party was arrested for disorderly conduct, authorized the magistrate to require her to give surety for her good behavior for a term not exceeding twelve months, and authorized him also in his discretion at any time to discharge the same. In addition to the powers conferred by this act, the statute of 1859, ch. 491, page 1129, sec. 5, gave the police justices authority to impose a fine not exceeding $10, or to commit to the City Prison not exceeding ten days. This power to commit was not any limitation of the power connected with the taking of sureties for good behavior, but was the means for collecting the fine so to be imposed in addition to the surety for good behavior. But if there was any doubt as to the authority of the magistrate to commit a party who refuses to give the sureties for good behavior when required, in the case of disorderly conduct, it is removed by that provision which says, that "any person committed to the common jail for not finding sureties for good behavior, may be discharged by two justices upon giving such security." (2 *Rev. Stat.*, 704, § 6.) This clearly implies the right to commit. I have not been able to adopt the conclusion that the commitment by the magistrate in this case was beyond his powers, but that having the party charged in his custody, and having found on competent proof that she was guilty of disorderly conduct, he had a right to require sureties for good behavior, and to continue the imprisonment until such sureties were found. The party is not without remedy, if she

is unable to give the sureties. There are various provisions which authorize the discharge of the party from prison; but that mode is not by *habeas corpus*. The prisoner must be remanded, and the writ discharged.

WILLET *a.* LASSALLE.

New York Superior Court; General Term, April, 1863.

PLEADING.—COMPLAINT ON UNDERTAKING GIVEN ON ARREST.—MEASURE OF DAMAGES.

In an action by a sheriff, upon an undertaking given to him by a defendant, arrested under an order of arrest in a civil action, it is not necessary to allege in the complaint, that he had not delivered the order of arrest and undertaking to the plaintiff's attorney in such former action, as required by section 192 of the Code of Procedure, in case such attorney demands it.

Any exoneration of the sheriff from liability, by such delivery, and the omission of the plaintiff to except to the bail, and the consequent liability of such bail to the plaintiff in such action, must come from, and be set up by the defendant, affirmatively, as matter of defence in his answer.

It is not necessary to allege in the complaint in such action, that any action has been brought against the sheriff.

It is not essential to aver in terms that the undertaking was delivered, nor does an averment that it was under seal vitiate.

The measure of damages in such an action is *prima facie* the whole amount of the undertaking.

Appeal from an order overruling a demurrer to the complaint.

The action was brought by James C. Willet, late sheriff of the city and county of New York, against Theodore Galliardet, John D'Homergue, and Charles Lassalle; upon an undertaking given by the defendants, on the arrest, in a former action, of the defendant Galliardet.

The allegations of the complaint were as follows:

"That the plaintiff, at the several and respective times hereinafter mentioned, was the sheriff for the city and county of New York, having been duly elected and sworn to said office, according to the statute in such case made and provided.

"And the plaintiff further shows, that heretofore, and on or

about the 7th day of June, in the year 1858, one Hiram Cranston commenced an action in the Supreme Court of the city of New York against the said Theodore Galliardet, for an assault and battery; and, upon affidavits of the cause of action, at the time of the commencement of the said action obtained from the Hon. JOHN SLOSSON, then and there being one of the justices of the said Superior Court, an order of arrest; which said order was directed to the plaintiff herein, as such sheriff aforesaid; by which said order the said plaintiff was commanded to arrest the said Theodore Galliardet, defendant above named, and to hold him to bail in the sum of $8,000 in the said action in favor of the said Hiram Cranston, against him, the said Theodore Galliardet; and that the said plaintiff return the said order to Whiting & Clark, plaintiff's attorneys, at No. 40 Park Row, in the city of New York, on the 15th day of June, 1858; which said order of arrest, so made as aforesaid, afterwards, and before the return-day of said order, to wit, on or about the 7th day of June, in the year 1858, at the city and county of New York aforesaid, was delivered to this plaintiff, as such sheriff as aforesaid, in due form of law to be executed; by virtue of which said order of arrest as aforesaid, this said plaintiff being such sheriff as aforesaid, afterwards, and before the return of said order, on the 7th day of June, in the year 1858, at the city and county of New York aforesaid, took and arrested the said Theodore Galliardet by his body, and then and there detained him in custody, as such sheriff, at the suit of the said Hiram Cranston, for the cause aforesaid; and the said Theodore Galliardet being so arrested and in custody of this plaintiff, being such sheriff as aforesaid, by virtue of the said order of arrest, this plaintiff afterwards, and before the return-day of said order of arrest, on the 7th day of June, in the year 1858, at the city and county of New York aforesaid, took bail for the appearance of the said Theodore Galliardet, defendant, that he should at all times render himself amenable to the process of the said court during the pendency of the said action, and to such process as should be issued to enforce the judgment therein, according to the statute in such case made and provided; and then and there the said defendants, John D'Homergue and Charles Lassalle, as bail and sureties for the said Theodore Galliardet, with the said Theodore Gal

liardet, on the day and year last aforesaid, at the city and county of New York aforesaid, by their certain writing obligatory, commonly called an undertaking on arrest, signed and sealed by the said defendants, and dated on the same day and year aforesaid, whereby they undertook, in the sum of $8,000, that the defendant Theodore Galliardet should at all times render himself amenable to the process of the said court during the pendency of the said action, and to such process as should be issued to enforce the judgment therein, as by the said undertaking, reference being thereunto had, may more fully and at large appear.

"And this plaintiff further shows, that the said Hiram Cranston did, on the 30th day of July, in the year 1859, obtain judgment against the said Theodore Galliardet, in the said Superior Court, for the sum of $9,024.44, damages and costs; a transcript of which judgment was duly filed in the office of the clerk of the city and county of New York, on the 1st day of August, in the year 1859; and that afterwards, and on the same day and year last aforesaid, the said Hiram Cranston did issue an execution against the property of the said Theodore Galliardet, directed to the sheriff of the city and county of New York aforesaid, whereby the said sheriff was commanded to satisfy the said judgment out of the personal property of the said debtor within his county; or if sufficient personal property could not be found, then to satisfy said judgment out of the real property of the said judgment debtor situated in his said county on the day when the said judgment was docketed, or at any time thereafter, in whosesoever hands the same might be, and return the said execution, in sixty days after the receipt thereof, to the clerk of the Superior Court of the city of New York. That the said execution was indorsed, directing the said sheriff to levy and collect the said sum of $9,024.44, with interest and fees, and was received by the said sheriff on the said day and year aforesaid.

"And this plaintiff further shows, that the said execution above set forth was afterwards, to wit, on the 3d day of October, 1859, duly returned by the said sheriff of the city and county of New York, wholly unsatisfied; and that thereupon, and afterwards, on or about the 28th day of November, in the year 1859, the said Hiram Cranston issued an execution against

the person of the said Theodore Galliardet, directed to the said sheriff of the city and county of New York, and commanding him to arrest the said judgment debtor, and commit him to the jail of his county until he should pay the said judgment, or be discharged according to law; which said execution was indorsed, directing the sheriff to collect the said sum of $9,024.44, besides interest and fees; and which said execution was afterwards, to wit, on the 27th day of January, 1860, duly returned by the said sheriff, 'defendant not found;' whereupon, and by reason whereof, an action has accrued to the said Hiram Cranston, and has been commenced by said Cranston against this said plaintiff for the said escape of the said Theodore Galliardet, by reason of the neglect of the said defendants, John D'Homergue and Charles Lassalle, to keep and render the said Theodore Galliardet at all times amenable to the process of the said Superior Court, and to the process issued to enforce the judgment in the action pending therein between the said Hiram Cranston, plaintiff, and the said Theodore Galliardet, defendant, according to the terms and conditions of their said undertaking made by the said defendants, and above set forth."

The complaint concluded by laying the damages at $8,000, for which sum plaintiff claimed judgment.

The defendants, Charles Lassalle and John D'Homergue, demurred to this complaint, and assigned as their ground of demurrer that it did not contain facts sufficient to constitute a cause of action.

The cause was heard at special term, in April, 1862, before Mr. Justice White, who overruled the demurrer, holding that the sheriff need not negative in his complaint the performance by himself and by the sureties (the defendants), of all the acts which might have rendered the defendants liable only to the plaintiff in the former action; but that performance of those acts, the doing of which the defendants supposed the sheriff should have negatived, must be pleaded in bar by the defendants, if they desired to present them as a defence.

From the order entered thereon the defendant, Lassalle, appealed.

F. R. Coudert, for defendant, appellant.

I. Upon the facts stated in the complaint, the plaintiff does not show himself entitled to recover. He does not aver: either, 1. That he has suffered any damage, or is likely or liable to suffer any; 2. That he is the holder of the bail-bond, or entitled to sue on it; 3. That it (the bail-bond) was ever delivered to any one or made to any one, or in fact ever made at all; 4. That he comes within any of the cases provided by the Code; 5. That the action in which Galliardet was arrested was ever prosecuted to judgment, or execution ever issued on said judgment. 6. There is no allegation that the plaintiff is the owner of the bond.

These facts being material, the complaint is insufficient. (Rodi *a.* Rutgers Fire Ins. Co., 6 *Bosw.*, 23.)

II. It being made the duty of the officer to return the process, together with the undertaking of the bail, to the plaintiff's attorney (see *Code*, § 192; 3 *Rev. Stat.*, 5th ed., 739), it is to be presumed that he performed that duty. If he did, upon the allegations of the complaint he has no standing in court.

III. There is nothing in the complaint bringing this case within any of the provisions of sections 193, 201, or 203.

IV. A sheriff is not entitled to look to the bail, except when they fail to justify; and in that case, he can only recover the "damages which he may sustain by reason of such omission." (See Loosey *a.* Orser, 4 *Bosw.*, 391.) And there is no allegation on either point.

V. There is no analogy between the cases brought under the Code, and those prosecuted under the old practice, as far as the capacity to sue is concerned. Formerly, the bond was made directly to the sheriff. It was necessary that plaintiff should allege this fact with great particularity, as upon this depended his ability to sue. (See 2 *Chitty on Pleading*, 449.)

Under the present practice, however, the undertaking belongs to the plaintiff in the action wherein the order of arrest was granted. There being no allegation to the contrary, it is fair to presume that the bail-bond is now in Cranston's hands.

VI. The complaint describes the instrument upon which the plaintiff seeks to recover against the defendants as a "certain writing obligatory, commonly called an undertaking on arrest,

signed and sealed by the said defendants," &c.; but it does not state that it was made to any one, which is essential in a bond. (See *Burrill's Law Dict.*, tit. Bond.)

There being no obligee mentioned in the instrument, the plaintiff should show some particular state of facts, or some special provision of law, as a foundation for his right to recover. This he has not done.

VII. The sheriff had not a right to retain the undertaking. It belongs absolutely to the plaintiff, who, therefore, has a right to sue upon it. (§ 192.)

VIII. The bail-bond or undertaking is a bond of indemnity, and something should be alleged to show that the sheriff has suffered some loss, or has incurred some liability, for which he is entitled to be compensated. He simply says, that he is sued for an escape, and claims that he is *ipso facto* entitled to the face of the bond and interest.

If the plaintiff's theory is right, he could recover the full amount and interest, whereas he might defeat the claim of Cranston by proving the insolvency of Galliardet.

IX. It is difficult to avoid the inference, after a careful perusal of the complaint, that Willet and Cranston have confederated against the defendants, and that any contest between them over the absent body of Galliardet is postponed, in the hope that these defendants may be offered up as scape-goats. The defendants, on the other hand, claim that, as sureties, they are bound only according to the strict letter or precise terms of their contract, and are considered as favorites of the law (Wright *a.* Johnson, 8 *Wend.*, 512, and cases cited); that they should not be driven to trial without knowing precisely on what grounds they are to be charged.

J. R. Whiting, for plaintiff, respondent.

I. The complainant sets forth all the facts necessary to constitute a perfect cause of action.

II. The execution of the undertaking fixes the character of the parties as bail to the sheriff. The statute enabling the sheriff to give notice to the plaintiff, and providing for exception and justification, is for the ease and favor of the sheriff alone; the bail have nothing to do with it. If the sheriff gives the notice, and the bail do not justify, the sheriff be-

comes the bail. If he omits to give the notice, which he may do designedly or from neglect, he becomes liable as bail. (*Code*, §§ 201, 203; Van Duyne *a.* Coope, 1 *Hill*, 557; *In re* Taylor, 7 *How. Pr.*, 214; Buckman *a.* Carnley, 9 *Ib.*, 180; Sartos *a.* Marceques, *Ib.*, 188.)

III. The sheriff, on an escape, may immediately take his remedy for a breach of the condition of the bond. (See Hinds *a.* Doubleday, 21 *Wend.*, 223.)

By the Court.*—Robertson, J.—This is an action on an undertaking given by the defendants to the plaintiff, on his arrest of the defendant Galliardet, under an order in an action by a third person (Mr. Cranston) against such defendant. The undertaking is in the usual form, promising that such defendant should at all times render himself amenable to the process of the court during the pendency of the action, and to such process as should be issued to enforce the judgment therein.

The complaint shows that such third person (Cranston) obtained judgment against the defendant Galliardet; issued an execution against his property, which was returned unsatisfied; and also, afterwards, an execution against his body, which was returned by the officer to whom it was directed, not found. These facts, in an action against the present plaintiff, by the plaintiff in such action, would be enough to charge the former with liability for an escape of the defendant therein.

The following are the only questions on the merits arising in this case.

First. Was the undertaking sued upon ever an obligation to the plaintiff, and could he ever have maintained an action upon it; and if so, did it ever cease to be so, and by what means?

Second. Is there any presumption of law in favor of the defendants, that the sheriff ever relieved himself of all responsibility for the production of the defendant's body, in the original action, upon final process, by the delivery of the order of arrest, his return thereto, and a copy of the under-

* Present, Robertson and Monell, JJ.

taking in suit, to the attorney for the plaintiff in such action?

Third. As incidental to the second question, does the liability of the defendant vary, by the undertaking being to the plaintiff in this action instead of the plaintiff in the original action?

The plaintiff, on the arrest of the former defendant, was liable as if he were bail, in case of an escape, rescue, or failure of the bail to justify, or of a deposit in their place (*Code*, § 201); and he may put in bail to surrender the defendant. (*Code*, §§ 201, 193–196 inclusive.) He is only exonerated by the delivery of the order of arrest, return, and certified copy of the undertaking, to the attorney for the plaintiff in the original action, and the omission by such attorney to refuse such bail, for ten days, or by the justification of the same, or new bail. (§§ 192, 193.) During all this time until justification, the bail are liable to the sheriff. (§ 203.) By the justification he is relieved, and the bail become liable to the plaintiff in the action. There is no allegation, in the complaint, of the delivery of such documents, or non-refusal to accept the bail.

In the next place, the delivery of the order of arrest and other documents to the plaintiff's attorney, authorized by the 192d section of the Code, is not a duty of the sheriff to any of the parties in the action; it is a privilege by which he relieves himself from responsibility, and until he does it, the bail are bound to him, but are not obliged to justify. If it were a duty, it would clearly not be one either to the defendant in the action, who can do nothing to enforce it, or to his bail, who are not benefited, and can only be harmed by it, by being required to justify. The defendants have a right to set up the same defences in an action by the present plaintiff on their undertaking, as they would were it brought in the name of the plaintiff in the former action. Whatever damages the plaintiff is liable in for the latter, he can recover from the defendants, and they are the same as the plaintiff in the former action could recover had he assumed the benefit of the undertaking and sued upon it. There is, therefore, no ground for presuming, in favor of the defendants, that the sheriff exonerated himself by delivering the proper documents to the

attorney for the plaintiff in the former suit. That, if the fact be so, should be set up as affirmative matter of defence. The defendants are neither better nor worse off than if the plaintiff in the former action were the plaintiff in this. In fact, the question to whom bail shall be liable, is entirely a matter of election between the sheriff and the plaintiff in the action. They are bound to produce the defendant's body, when required by a final process, and if they do not, to indemnify the party actually injured thereby.

It is settled that the sheriff is not obliged to wait until he is sued in order to make the bail liable (Hinds *a.* Doubleday, 21 *Wend.*, 223); and therefore the allegation in the complaint, of the institution of an action against him, is immaterial. The omission to allege expressly that the judgment stated to have been recovered was so in the action originally referred to in the complaint, is aided by the rest of the averments. Advantage can only be taken of it by a motion to make the complaint more definite and certain. The statute does not require the undertaking to be delivered to any one, but merely to be executed by the bail (§ 187), which is termed giving bail. (§ 186.) It is not a mere contract: it is a stipulation in court, or recognizance, which enures to the benefit of the party entitled. A seal cannot do it any harm. Formerly a bail-bond was in form to the sheriff, but the law permitted a plaintiff, when assignee of it, to sue upon it, even when other assignees could not sue in their own name. The present practice is perhaps simpler and equally efficacious.

Unless, therefore, it is to be assumed that the plaintiff relieved himself from responsibility by delivering the proper documents to the attorney for the plaintiff in the former action, which does not appear in the complaint, it shows a clear liability on the part of the defendants.

I do not see how, if the judgment had been said to have been recovered in the same action in which the order of arrest was issued, and the allegations respecting a seal to the undertaking and the commencement of a suit against the plaintiff had been omitted, a better complaint could have been drawn.

The defendants may be able to set up and prove facts in mitigation of damages, but *prima facie* the plaintiff in the original action was entitled to recover the whole amount of the original

bail, against the present plaintiff; and of course he is equally entitled to recover the same against the present defendants.

The order overruling the demurrer in this case must be affirmed, with costs.

PHILIPS' CASE.

Supreme Court, First District; General Term, January, 1865.

DISCHARGE IN INSOLVENCY.—AMENDMENT OF PETITION.

In proceedings by an insolvent to obtain a discharge from his debts under the two-thirds act, the omission by judgment creditors uniting in the petition, to add to their signatures, at the time of signing, a relinquishment of their judgments to the assignee, is an irregularity, and does not deprive the judge, to whom the petition is presented, of jurisdiction.

The defect may be cured by subsequent amendment, before further proceedings in the case.

Certiorari to review proceedings in insolvency.

SUTHERLAND, J.—The certiorari in this case brings up for review only questions of jurisdiction, of regularity, and of law. (Morewood *a.* Hollister, 2 *Seld.*, 309.)

The only question presented by the return appears to be one of jurisdiction.

Certain of the petitioning creditors were judgment creditors, and did not, at the time of signing the petition, add to their signatures a declaration that they relinquished such judgments to the assignee to be appointed, though such relinquishments were subsequently, and before any further proceedings by the judge, obtained and attached to the petition.

If the omission of these judgment creditors at the time of signing the petition was a mere irregularity, it was thus cured.

The Russell & Irwin Manuf. Co. *a.* Armstrong (12 *Abbotts' Pr.*, 472), is a decision of the general term of this district to the effect that this omission did not deprive the judge of jurisdiction, but was a mere irregularity.

The proceedings should be affirmed with costs.

LEONARD, J.—In the case of Hurst (7 *Wend.*, 240), an amendment was allowed, specifying the consideration of several debts, which had been omitted by the insolvent in the account of his creditors.

The amendment was held to be an answer to the objection that the original account was defective in this respect.

The amendment allowed in the case of Philips appears to be of a similar character.

The amendment in the present case, as in that of Hurst, cured an irregularity in a point not material to give the judge below jurisdiction over the case in its inception. Otherwise the amendment would have been within the principle decided in Small *a.* Wheaton (4 *E. D. Smith*, 306).

I concur with Judge Sutherland's conclusion.

BARNARD, J., concurred.

LEVY *a.* NICHOLAS.

New York Superior Court; General Term, April, 1863.

LIABILITY OF BAIL.

Special bail who have become fixed, cannot, in an action against them as such bail, show, either in bar of the action, or in mitigation of damages, that, before the recovery of judgment against their principal, he was, and at all times since has been, utterly insolvent, and had no property whatever that could, or was liable to be applied towards the payment of such judgment.

Appeal from an order sustaining a demurrer to part of an answer, and directing judgment for the plaintiff thereupon.

The action was brought upon an undertaking of bail, given by the defendants Thomas Stacy and Anastasius Nicholas, upon the arrest of one Edwin R. L'Amoureux, upon an order of arrest granted in a civil action against him under the Code of Procedure.

The undertaking was in the usual form.

The complaint alleged, besides the arrest, and the execution of the undertaking, which was in the sum of $2,000, that the plaintiff had recovered judgment in the former action against L'Amoureux, and after execution against property issued and returned unsatisfied, he had issued execution against the person, which was returned "defendant not found," and that the condition of the undertaking had been broken, and he demanded judgment for the sum of $1,300.08, the amount of the judgment against L'Amoureux.

The defendant Nicholas answered, denying various allegations of the complaint, and proceeding as follows:

"And for a second and distinct defence as to the claim of the plaintiff in this action, or as to the principal or some part thereof, or in mitigation of the damages (if any) to be recovered in this action, this defendant further says, that before and at the time of the recovery of the said alleged judgment in the complaint specified, and also before and at the respective times of the issuing and return of the said two alleged executions in the said complaint also specified, and of each of them respectively, the said Edwin R. L'Amoureux was, and ever since has been, and still is, utterly insolvent.

"And that before and at those several and respective times, the said Edwin R. L'Amoureux had no property whatever that could, or ought to be, or was liable to be applied to or towards the payment or satisfaction of the said judgment or any part thereof."

To this second defence in the answer the plaintiff demurred, and the cause was heard at special term in October, 1862, before Mr. Justice Barbour, who sustained the demurrer, and ordered judgment thereon for the plaintiff.

The defendant now appealed.

S. Whitehorne, for defendant, appellant.

S. B. H. Judah, for plaintiff, respondent, cited *Petersdorff on Bail*, 351; *Code*, §§ 187, 291; 2 *Chitt. on Pl.*, 177; 1 *Ib.*, 104, 105; *Gilbert on Debt*, 395; McCreery *a.* Willett (23 *How. Pr.*, 129); Renick *a.* Orser (4 *Bosw.*, 384); 2 *Rev. Stat.*, 3 ed., 479, §§ 34–36.

By the Court.*—Bosworth, Ch. J.—The only question presented by this appeal is, whether special bail who have become fixed, can, in an action against them, as such bail, show, either in bar of the action or in mitigation of damages, that, before the recovery of judgment against their principal, he was, and at all times since has been utterly insolvent, and had no property whatever that could, or was liable to be applied towards the payment of such judgment.

That fact is not one of those which the Revised Statutes (2 *Rev. Stat.*, 383, §§ 33 and 34) provide may be pleaded or presented as a ground for relieving bail.

On a breach of the bail-bond given on the arrest of a defendant, conditioned for his appearance, and putting in bail, such bail are liable for the amount of the debt or demand against the principal, the costs of the original suit, and of the suit on the bond (to the extent of the penalty of such bond (2 *Rev. Stat.*, 349, §§ 11 and 12; *Ib.*, 358, § 12). And special bail, who have become fixed, and are liable as such, can only be relieved by paying the judgment against their principal (that not being larger than the sum in which they undertook as bail) and the costs of the action against themselves. (*Graham's Practice*, 426, 427; Blaney *a.* Holt, and Same *a.* Hardell, 3 *Nev. & Mann*, 529. See Stever *a.* Sornberger, 24 *Wend.*, 275; Gregory *a.* Levy, 12 *Barb.*, 610; and *Code*, §§ 199 [174] and 200 [175.])

Such was clearly the measure of the liability of special bail; and the character and extent of the relief to which a plaintiff, on such a state of facts, was entitled before the Code.

Sections 468 of the Code declares, that "all rights of action given or secured by existing laws may be prosecuted in the manner provided by this act."

Rights given, or liabilities created and defined by existing laws, are not modified, impaired, or diminished by the general provisions of the Code prescribing the procedure to be conformed to in civil actions.

The order should be affirmed.

Robertson, J.—The undertaking of the defendant was, that the debtor in the former suit (L'Amoureux) should at all times

* Present, Bosworth, Ch. J., Robertson and Barbour, JJ.

render himself amenable to the process of the court during the pendency of the action, and to such as might be issued to enforce the judgment therein. They have at all times authority to produce the person of the debtor in their exoneration, and the plaintiff in such action was entitled to insist on the production of the body or payment of the debt. They were not public officers upon whom the execution of process may devolve, even against his will, but volunteers; such as are most usually friends of the party arrested. The order of arrest would be of little avail to procure the payment of a debt, if the sureties for his appearance could refrain from producing his body, and speculate on their ability to prove his insolvency, when the most important witness might be absent. For an accidental inability to produce the body of the debtor at the time, the court may furnish relief. (Baker *a.* Russel, 11 *Barb.*, 304.) But if negligent or indifferent in attempting to produce it, the law implies either indemnity or fraud, and makes the sureties liable. Bail may also be substituted for the actual deposit of the amount for which the defendant is ordered to give bail, and which amount would be unconditionally applied to satisfying the judgment. (*Code*, §§ 199, 200.) The change of security ought not to alter the plaintiff's rights. Besides this, the plaintiff is bound to test the solvency of the debtor by exemptions against his property and the facility of procuring his person as a pledge by an execution against it (2 *Rev. Stat.*, 382, §§ 29, 30), and any fraud or collusion in the efforts by such executions to collect the amounts due, deprives him of the right to proceed against the bail. (*Ib.*, 383, § 31.)

The Code of Procedure re-enacts the cases for exonerating bail originally provided for in the Revised Statutes, as amended by a statute passed in 1845. (2 *Rev. Stat.*, 382, § 32; *Sess. Laws of* 1845, chap. 231, § 3; *Code*, § 191.) One of them is the legal discharge of the debtor; not from the debt, but from the obligation of rendering himself amenable to process, showing that the plaintiff was to have the money or the defendant's body, if amenable to process, as security for the debt. The same principle is laid down in elementary works.

I therefore concur in affirming the order appealed from.

DICKINSON *a.* MITCHELL.

Supreme Court, First District; General Term, May, 1865.

REFERENCE OF LONG ACCOUNT.—APPEALABLE ORDER.

No compulsory reference can be ordered under section 271 of the Code of Procedure, unless the examination of a long account be required.
A bill of particulars is not an account proper in the legal sense of the term.
Five items do not constitute a long account.
An order of reference made in such a case is appealable.

Appeal from an order of reference.

This was an action for work and labor, and legal services rendered by the plaintiff as counsel for defendant, claiming two thousand dollars.

On demand by defendant, a bill of particulars was put in by plaintiff, containing five distinct items of charges on the debit side, and one item on the credit side. The defendant pleaded a general denial, and also set out a special defence.

On motion of plaintiff's counsel, setting forth by affidavit that the examination of a long account would be required on part of plaintiff, which was opposed by defendant, claiming that no account was involved, a reference to determine all the issues was ordered by the court at special term, held at chambers by Mr. Justice BARNARD.

The defendant appealed from this order.

B. Roelker, for the defendant, appellant.—I. This is not a case in which a compulsory reference could be ordered under section 271 of the Code, as it does not involve the examination of a long account. A bill of particulars is not an account proper in the legal sense of the term. And even if it were an account, it is not a long account. (Sharp *a.* The Mayor of N. Y., 18 *How. Pr.*, 213; Freeman *a.* Atlantic Mutual Ins. Co., 13 *Abbotts' Pr.*, 124; Harris *a.* Mead, 16 *Ib.*, 257; 6 *Hill*, 373; 2 *How.*, 79; *Ib.*, 171; 3 *Ib.*, 9; 6 *Wend.*, 505; 10 *Ib.*, 577; and Keeler *a.* Poughkeepsie Plank Road Co., 10 *How. Pr.*, 11.) The

decision and opinion of Judge DEAN in this case having been confirmed by this court, at this present general term, in the case of Goodrich *a.* Lorillard Ins. Co., and the opinion of the Superior Court, in Whitaker *a.* Desfosse (7 *Bosw.*, 678), overruling this case in 10 *How. Pr.*, 11, having been disapproved of by this court.

II. On the question of a right to appeal. (See 13 *Abbotts' Pr.*, 124; 16 *Ib.*, 257; 6 *Hill*, 373; 6 *Wend.*, 505.)

Samuel G. Courtney, for plaintiff and respondent.—I. The demand of the plaintiff is for work, labor, and services rendered defendant as counsel. The answer denies each and every allegation in the complaint; and therefore puts at issue the amount of labor, its time, and the value of the same.

1. The bill of particulars of the plaintiff's demand shows the account to be necessarily a long one.

2. All the labor done, what was done, how much time occupied under each item, under the pleadings, must be shown; also, by experts and professional men, what such labor, time, and services were worth.

II. Such an action and such issues are properly referable. (See *Code*, § 271, subd. 1.)

In an attorney's action to recover compensation for his services, a reference may be had to ascertain the amount he will be entitled to recover. (Bowman *a.* Sheldon, 1 *Duer*, 607.)

III. This order is not appealable.

The question whether the trial of an issue of fact will involve the examination of a long account, is a question of fact to be determined summarily upon the application to refer. If there is sufficient evidence to authorize the court so to find, granting a reference rests in its discretion, and the order is not appealable. (Dean *a.* Empire Mutual Ins. Co., 9 *How. Pr.*, 69.)

The allegation in the moving affidavit made by the attorney, that the trial would involve the examination of a long account, is sufficient evidence to authorize the court to order a reference. (Whitaker *a.* Desfosse, 7 *Bosw.*, 678.)

BY THE COURT.*—The order is appealable, as it affects a substantial right.

* Present, INGRAHAM, P. J., WELLES and CLERKE, JJ.

The bill of particulars in this case is not an account in the ordinary or legal sense of the term. And if it were an account, it would not be a long account, such as would justify a compulsory reference.

Formerly four items were held sufficient to constitute a long account; but the later decisions of the courts do not deem this a long account.

The order below must be reversed, with ten dollars costs to defendant, to abide the event of the action.

MATTISON *a.* SMITH.

New York Superior Court; General Term, November, 1863.

PLEADING.—EVASIVE DENIAL.

An answer in terms merely denying "each and every *material* allegation in the complaint," is evasive, and obnoxious to a motion that it be made more definite and certain.

A denial in an answer should, by its words, so describe the allegations of the complaint which the pleader intends to controvert, that any person of intelligence can identify them.

Appeal by the plaintiffs, from an order denying their motion that the defendant be required to amend his answer.

The action was brought by the plaintiffs, in behalf of themselves and all other judgment creditors of William P. Demarest and George A. Middleton, who should come in and contribute to the expenses of the action, for the purpose of setting aside an assignment made by the debtors to one Powers, who was joined with them as a defendant in this action; and also to reach assets alleged to be in the hands of the defendant Smith, and to set aside as fraudulent a judgment he held against them. The complaint was verified.

The defendant Smith interposed an answer, which was also verified, which simply stated that he denied "each and every material allegation in said complaint contained."

The plaintiff's motion for an order requiring the defendant to make his answer more definite, was heard at special term in July, 1863, before Mr. Justice MONCRIEF, and was denied, with costs.

From that decision the plaintiffs now appealed.

John Graham, for plaintiffs, appellant, cited 2 *Duer*, 684; 20 *Barb.*, 378, 386; McKyring *a.* Bull, 16 *N. Y.*, 297, 303.

W. H. & S. P. Bell, for defendant, respondent.—I. The answer is a good general denial. (*Code of Pro.*, § 149.)

That is surely a perfect answer which simply and merely denies the allegations constituting the plaintiffs' cause of action. (Radde *a.* Ruckgaber, 3 *Duer*, 684.)

No allegation is material which will not prevent a plaintiff from recovering if proved to be untrue, or which, when denied, he is not bound to prove to entitle himself to a verdict. (Oechs *a.* Cook, *Ib.*, 165.)

It must be observed that there are three parties joined in the defence.

1. Demarest and Middleton, judgment debtors.
2. Randall J. Powers, their assignee.
3. E. A. Smith, a preferred creditor under the assignment.

All three are independent of each other, and have separate interests; all three are charged with a conspiracy to defraud. The plaintiffs assert a judgment recovered against the judgment debtors since the assignment.

The pleader is presumed to know what is the ground of this action against each of the defendants, where he charges each with separate acts; and is presumed to know what charge affects each.

The words "material" and "controverted" were not inserted in section 149 of the Code, without a meaning and a purpose. The plaintiff, when he makes a charge, considers its materiality first. The defendant, if he thinks it materially affects him, denies it; and with that which affects an independent co-defendant, he has nothing to do. The intention of the Code was to simplify and shorten pleadings.

It is at the defendant's risk and option whether he denies specifically or generally; and the court cannot compel him to

adopt one rather than the other. And the distinction must be kept in mind. This answer is not a denial of any knowledge or information sufficient to form a belief.

A review of the allegations of the complaint shows that many of them are made on information and belief, and are not material for the defendant Smith to answer.

Good pleading requires that the allegations should be made positively, in order to prevent immaterial issues and confusion. (Truscott *a.* Dole, 7 *How. Pr.*, 221.) The plaintiff could not have obtained an injunction on this complaint. (3 *Abbotts' Pr.*, 182, 328; 12 *How. Pr.*, 464.)

The sufficiency of the answer is further sustained by Kellogg *a.* Church (4 *Ib.*, 339); and Parshall *a.* Tillou (13 *Ib.*, 7).

II. The order is not appealable, for it does not affect the merits.

By the Court.*—Bosworth, Ch. J.—The plaintiffs appeal from an order denying a motion that the defendant Smith be required to amend his answer, by alleging which of the allegations in the complaint he denies, and to make it definite and certain, so that the precise nature of his defence (if any he has) be made apparent.

The answer, exclusive of the title of the action, is in these words, viz., "Edmund A. Smith, one of the defendants in above action, answering the complaint in said action for himself, denies each and every material allegation in said complaint contained." The complaint and answer are verified.

The Code enacts that "the answer of the defendant must contain—1. A general or specific denial of each material allegation of the complaint controverted by the defendant," &c.

This imports that the answer, by its terms, must show which of the allegations of the complaint the defendant controverts, and those allegations he may deny in a short form of denial, or he may deny them specifically.

The Code designed that the pleadings under it should be such as would leave it free from doubt what issues of fact were raised by them; and that to ascertain this, it would not be necessary to consider abstract principles of law, and determine

* Present, Bosworth, Ch. J., White and Morell, JJ.

the legal effect of any particular allegation of fact, in respect to which the judges of subordinate courts might not agree; and the judges of the court of last resort might, probably, differ.

If the answer, on a just construction, means that the defendant denies each and every allegation of the complaint which he deems material, then it is quite clear that there is no mode of ascertaining which of the allegations he controverts, or which ones he has denied, either in fact or intent.

If it means that he denies each and every allegation which, in intendment of law, is material; then it is evident that, as the court must decide which are material, the answer is, in legal effect, a denial of each and every allegation which the court shall decide to be material.

An answer in form, thus, "The defendant denies each and every material allegation in the complaint which the court shall hold to be material," would not inform a plaintiff which of the allegations the defendant controverted, or intended to deny.

The Code, by requiring a defendant to verify his answer where the complaint is verified, intended to require him to admit all the allegations which, if true, were true of his own knowledge, or incur the risk of suffering the pains and penalties of perjury.

The fact that some men, when not required to answer on oath, will deny some allegations of the complaint which they would not dare to deny on oath, furnishes no argument in favor of the sufficiency or definiteness of the present answer. The Code expects good faith and common honesty in putting in all answers, whether verified or not; but as that is not always practised, it has provided that, on motion, sham answers may be stricken out (§ 152); and evasive and indefinite ones may be required to be made definite and certain. (§ 160.)

It has been held that an answer which denies "each and every allegation of the complaint," is sufficient. (Kellogg *a.* Church, 4 *How. Pr.*, 339.) So also an answer which denies all the allegations which are contained between specified folios. (Gassitt *a.* Crocker, 9 *Abbotts' Pr.*, 39.) In these cases, by merely looking at the words of the complaint and answer, it is apparent what allegations are denied. The answer by the words it contains describes and identifies the allegations which

are denied, so that any person of intelligence, whether lawyer or layman, can determine with accuracy what allegations are put at issue.

In the present case, it is impossible to ascertain from the answer what is the ground of the defence. No new matter is set up; and it cannot be known from the answer on which of the allegations of fact found in the complaint and their supposed falsity, the defence is to rest.

Such a form of answering should not be encouraged. It is, to say the least, evasive, and if sanctioned, would tend to authorize the general issue in all cases, although a defendant would not hazard a specific or even a general denial in terms, on oath, of every allegation which is clearly material.

This is an equity suit, by judgment and execution creditors; and such an answer is in conflict with the spirit, as well as letter, of all the rules and practice applicable to answers in such suits. The mode of answering prescribed by the Code, assimilates more nearly to the chancery than to the common-law practice.

It, however, permits a general denial of every allegation which a defendant wishes to controvert, and can conscientiously deny. But the word "controvert," which has been retained in this section in all the changes made in its form, must have some meaning given to it, if it can appropriately have any meaning.

The word "controverted," in connection with the word "denial," whether the denial be general or specific, requires that the answer should, by its words, so describe the allegations of the complaint controverted, that any person of intelligence, though not a lawyer, can identify them.

An answer which so denies the allegations of a complaint, that it must be left to the uncertainty of a future judicial decision, however learned or unlearned the judge may be who makes it, to ascertain which are denied, and which are not denied, is one which no plaintiff should be told he must be content to receive.

The Code has not introduced such laxity in pleading. No system ever in force in this State, permitted it. There has been no decision cited, which sanctions it.

I think the order should be reversed, and the defendant re-

quired to amend his answer so as to make it definite and certain; and render the ground of defence apparent, by a clear identification of the allegations of fact which the defendant controverts.

No costs of the appeal should be given to either party; and plaintiff should have $10 costs of the motion at special term, to abide the event.

CHEESEMAN *a.* STURGES.

New York Superior Court; General Term, December, 1860.

AMENDMENT.—SUPPLEMENTAL COMPLAINT.

The plaintiff, in an action brought to compel a delivery of stock, and for settlement of an account connected with it, cannot, after a lapse of several years, during which, with knowledge of the facts, he has prosecuted the claim in that aspect, and obtained and acquiesced in a judgment thereon, be allowed to file a supplemental complaint, changing his claim to a demand for damages by reason of a dealing in such stock.*

Appeal from an order allowing plaintiff to file a supplemental complaint.

This action was brought by James L. Cheeseman against James H. Sturges and others. The facts material to this appeal are fully stated in the opinion of the court.

C. C. Nott, for the appellants.

J. W. Gerard, for the respondent.

BY THE COURT.—HOFFMAN, J.—The case was before the general term of this court in April last, upon the decision of a referee, according to which judgment had been entered in the plaintiff's favor.

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* Compare Salters *a.* Genin, 10 *Ante*, 478; 8 *Ib.*, 253.

The views of the general term of the rights of the parties upon the facts presented were these:

Cheeseman had sought and demanded an interest in certain stock of a company called The New York Ice Company, incorporated in the autumn of 1856, which stock was in the hands of the defendants, or some of them. The general term considered that he was entitled to this relief, subject to certain conditions, and to no other relief. That, as a consequence, Cheeseman was bound to pay Sturges one-third of the cash balance in Sturges' favor, arising from the advances of the latter for the concern. The referee had adjusted this balance; it was assumed for the main question that such adjustment was right, although questioned by exceptions on the defendant's part in various particulars. So the general term held that the plaintiff should have his aliquot proportion of the stock, paying his proportion of the debt due Sturges. The referee had extinguished Sturges' money demand by so much of the stock in his hands at its par value, and then gave judgment for one-third of the residue, payable in stock (so many shares) to the plaintiff. The general term held this to be error. The plaintiff was bound to pay Sturges one-third of the balance of his cash advances in cash, and take one-third of the stock. There was nothing to warrant the imposition upon Sturges of one-third of the depreciation of the stock.

On this ground a new trial was ordered. The plaintiff took his judgment, and took neither exception nor appeal.

The supplemental complaint, allowed by the order appealed from to be plead, states that on the 27th day of January, 1857, the defendants, in combination with other companies, altered and destroyed the stock, and consolidated its property and effects with two of the companies, issued stock to the amount of $500,000, $350,000 of which was the old capital, and the remainder was based on property of said other companies, and that the certificates of the original stock were cancelled by these acts since the commencement of the action. He therefore prays judgment for the par value of the stock in cash.

It appears that the act of consolidation or increase of the capital, out of which the alleged destruction of the original stock arose, took place on the 27th day of January, 1857, and was known to and discussed by the plaintiff in February or March

of that year. On the 30th day of March it was known to him and acted upon, on a motion to dissolve the injunction, which the plaintiff had obtained on his complaint.

That injunction order, made January 27, 1857, enjoined the defendants from disposing, &c., of the capital stock which had come to their hands, as the consideration of the sale of the property, and any other stock or property which may have come into their hands, in exchange for, or in lieu of, said stock received as aforesaid.

On the 3d day of April, 1857, the motion made on the 30th day of March was decided, and an order made, by which the injunction was dissolved, except as to twenty-five thousand dollars of the stock of The New York Ice Company mentioned in the affidavit, but was ordered to be continued as to that amount. The defendants were enjoined from selling the remaining one hundred and fifty thousand dollars worth of stock for less than enough to pay the advances; and the order was not to be considered as preventing the plaintiff from claiming at the trial that the defendant, Sturges, was bound to take the stock at par for the advances made in payment of the land.

December 6, 1857, the order was modified, allowing the defendants to deposit with the clerk the stock of The New York Ice Company to the amount of $25,000, the company stipulating that the stock should not be forfeited, or an assessment collected thereon, or the defendants paying the assessment, with a lien upon the stock for it, if it should be decided that the assessment was a valid lien. Stock was deposited under this order, its conditions being complied with.

Thus the plaintiff chose to pursue the then and now existing stock for his demand, assumed the very ground in which the referee sustained him, that Sturges must be paid in stock, and got enough secured in court to insure his claim; and went on for three years with his litigation on that case, and with that object.

His suit was commenced January 21, 1857; referred April, 7, 1857; judgment had, January 10, 1859; and a new trial ordered, April, 1860.

The supplemental complaint is an attempt to change an action for the delivery of stock and settlement of an account connected with it, into a money demand for damages by reason of

a dealing with such stock, founded on facts known to the plaintiff over three years since, just after his original complaint was served, after he has gone through a protracted litigation for the stock, and taken a judgment for it, and acquiesced in that judgment because its terms were favorable.

The action was framed and tried upon the proposition that the defendants had the plaintiff's property and must deliver it, and must be restrained from parting with it. The defendants admitted they had his property, contesting the amount, but insisting that he must pay his share of their advances of it. The plaintiff now seeks to say that the defendants destroyed his property, and demands damages. This, after knowing more than three years ago every fact connected with the alleged destruction, after litigating upon his original cause of action, and after the court has determined what are his rights upon the case, he has made and adhered to. It would be marked injustice to the defendants to allow this.

The order appealed from is reversed, without costs.

SIMMONS *a.* ELDRIDGE.

Supreme Court, Third District; General Term, May, 1865.

PLEADING.—LIBERAL TESTS OF SUFFICIENCY.

Under the liberal rules of pleading established by the Code of Procedure, a complaint should not be dismissed upon the trial because it is indefinite or uncertain, or contains irrelevant or redundant matter.

Allegations of a complaint in a creditor's action *held* sufficient under this rule.*

Appeal from a judgment.

This action, which was brought by Anthony Simmons, as executor of the will of Elisha Eldridge, against Clinton Eld-

* The following recent decisions still further illustrate the requisities of complaints in creditors' actions:

In an action by a creditor having only a general lien by his judgment, to set

ridge, and Henry and Betsey Moyer, was referred to a referee, who upon the opening of the trial, before any evidence had been adduced, dismissed the cause upon the ground that there was no cause for action. From the judgment entered thereon, the plaintiff appealed.

By the Court.*—Ingalls, J.—It appears from the report of the referee, that he disposed of the case upon the opening of the counsel for the plaintiff, without evidence. It also appears that the plaintiff's counsel in such opening stated the facts more minutely, but substantially as alleged in the complaint in this action. The only question presented upon this appeal is, whether there are facts stated in the complaint which entitle the plaintiff to give evidence in support of a cause of action therein alleged.

The complaint alleges that the plaintiff, in 1859, was duly appointed executor of the will of Elisha Eldridge, deceased; that in March, 1860, the plaintiff, as such executor, recovered a judgment in the Supreme Court against the defendant Clinton Eldridge, for moneys paid by the testator as his indorser, &c., amounting to $451.31; that execution was duly issued, and returned unsatisfied; that $451.31, with interest, was still due on the judgment when the action commenced; that by the foreclosure of a mortgage, the legal title of said Clinton Eldridge to certain real estate was divested for the purpose of placing the same beyond the reach of his creditors, and beyond the reach of

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aside a prior judgment alleged to have been paid, but fraudulently kept on foot, it is not necessary to allege the issue of an execution to the county where the lands lie: execution unsatisfied in the county where the debtor resides, is enough. (Shaw *a.* Dwight, 27 *N. Y.*, 244.)

In an action against an insolvent partnership, to compel a fraudulent assignee to account as trustee, it is necessary to allege the issue and return of an unsatisfied execution. (Dunlevy *a.* Tallmadge, 32 *N. Y.*, 468, reversing S. C., 18 *Ante*, 48.)

If a fund sought to be reached is alleged in a complaint as a legacy to the debtor, but is held by the court, upon a just construction of the will in question, to be a legacy to executors in trust to apply income to the debtor's use, the plaintiff cannot reach surplus income. The allegations of his complaint preclude such relief. (Genet *a.* Beekman, 26 *N. Y.*, 35.)

As to the necessity of setting out facts showing fraud or collusion, where fraud or collusion is set up, see Culver *a.* Hollister, 17 *Ante*, 405.

* Present, Hogeboom, Peckham, and Ingalls, JJ.

the plaintiff's judgment, and enabling the said Clinton Eldridge to control the same and the avails thereof. The complaint also contains this further allegation: "And the said plaintiff further says, that the said Clinton Eldridge has property personal and interest in property real in the sum of over $7,000, held in trust, or controlled for him, by the said Betsey Moyer and Henry Moyer, by a colorable fraudulent transfer of his property to the said Betsey and Henry Moyer, for the purpose of placing the same beyond the reach of the claims of his creditors, and enabling him to enjoy the avails thereof." The relief demanded in the complaint is, in substance, that the said property be applied to the payment of the plaintiff's judgment, &c. The plaintiff duly excepted to the decision of the referee dismissing the complaint.

I am of opinion that the referee erred in dismissing the complaint. The sufficiency of this complaint is to be determined, not according to the strict rules of pleading which existed previous to the Code, but in the light of the more liberal system introduced by the Code. Section 140 of the Code provides, "All forms of pleading heretofore existing are abolished," &c. In Jordan Plankroad Co. *a.* Mallory (23 *N. Y.*, 553), DENIO, J., says: "In pleading under the Code, it is sufficient to state the facts from which the law infers a liability, or implies a promise." In Wright *a.* Hooker (10 *N. Y.*, 51, 59), EDWARDS, J., says: "The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used or to the legal conclusion adopted by the pleader." In Zabriskie *a.* Smith (13 *N. Y.*, 322, 330), DENIO, J., remarks: "Under our present system of pleading, I conceive that a pleading should contain the substance of a declaration under the former system. It is sufficient, however, that the requisite allegations can be fairly gathered from all the averments of the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language." (See also Emery *a.* Pease, 20 *N. Y.*, 62.) In Butterworth *a.* O'Brien (37 *Barb.*, 192; S. C., 24 *How. Pr.*, 440), INGRAHAM, J., says: "In fact, under the late decisions in the Court of Appeals, we are not to pay any attention to forms, if we can find in the complaint any allegations which, under any view of them, may give the plain-

tiff a right to recover." In the last case the referee dismissed the complaint, and the judgment was reversed.

I think it quite apparent that the facts above stated present a cause of action, and, if sustained by evidence, would entitle the plaintiff to recover. There is alleged the existence of a debt, the recovery of judgment, the issuing and return of execution, the transfer of property of the judgment debtor, with intent to remove the same beyond the reach of the creditors of Eldridge, and beyond the reach of plaintiff's judgment, yet placed in such a situation as to enable Eldridge to control the same, and enjoy the avails thereof.

The law would be lame, indeed, if upon such a state of facts a judgment creditor could be prevented from reaching the property of the judgment debtor. It is not a fatal objection to a complaint, upon a motion to dismiss the same, that it contains matter which is irrelevant or redundant, or that the allegations of the pleading are indefinite or uncertain. Such defects are to be remedied by motion under section 160 of the Code. (Moyer *a.* Van Collen, 28 *Barb.*, 230, 233.)

The judgment must be reversed and a new trial ordered, with costs to abide the event.

MEYER *a.* MOHR.

New York Superior Court; General Term, November, 1863.

CREDITOR'S ACTION.—PROOF OF RETURN OF EXECUTION.—EXISTENCE OF LEVIABLE ASSETS.—RIGHT OF DOWER.

In a creditor's suit, the previous issue and return of execution, when requisite, is sufficiently proved by producing the execution with the sheriff's return and the date of filing indorsed thereon, and testimony of a witness that he had seen it on file in the clerk's office.

Showing that there was some personal property which might have been seized, does not affect the plaintiff's right to maintain the action, unless it be also shown that he knew of its existence, and omitted to levy.

Where the wife of a debtor joins with him in the execution of a fraudulent conveyance of his real property to a third person, who reconveys to her, and the

conveyances are set aside at the suit of a creditor, she is not entitled to have her dower reserved to her by the judgment.

Appeal from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was in the nature of a creditor's bill, and was brought by Christian T. Meyer to set aside a conveyance of real estate made by the defendant, John H. Mohr, to the defendant, Margarita, his wife (through the medium of the defendant, Emmons), and which the plaintiff, who was at the time of the conveyance a creditor of John H. Mohr, and who subsequently, and before the commencement of this action, obtained a judgment against Mohr, upon his demand against him, alleged to have been made with intent to defraud the creditors of Mohr, and especially the plaintiff. The complaint also demanded that the real estate be sold to satisfy the plaintiff's judgment, &c. The defendant, John H. Mohr, denied the fraudulent intent charged, and also denied that he was indebted to Meyer.

The cause was referred to Murray Hoffman, Esq., as referee.

Upon the trial, the plaintiff, in order to prove the issue and return of execution upon his judgment, produced the execution indorsed on one side, with the usual direction to levy; and on the other, at the upper part, "Received June 26, 1861. No personal or real property. John Kelly, sheriff;" and at the bottom, "Filed August 23, 1861."

The counsel for the defendants objected to the admission of the paper in evidence, on the ground that there was no evidence of any receipt of the execution by the sheriff, or of any return by him of the same.

The referee overruled the objection, and the defendants duly excepted.

When the plaintiff rested, the defendants moved to dismiss the complaint; but the referee allowed him to produce further evidence, showing that the present action was not commenced for more than sixty days after the execution was issued, and also the testimony of a witness, Newman, the attorney's clerk, as to the execution having been filed, which was as follows: "I went to the clerk's office, and found the execution had been returned,

and we directly after commenced this suit. When I went there, this paper marked (witness referred to execution already introduced) was the execution which I found returned. I should say this paper (referred to same execution) was the original execution which I saw at the clerk's office, or an exact copy of it. I have no doubt it is the original."

The defendant excepted to the refusal of the referee to dismiss the complaint.

The conveyances which the plaintiff sought to have set aside were a deed of real property made by the defendants, Mohr and his wife, the latter joining therein to release her right of dower to the defendant, Emmons, and a deed of even date therewith, by Emmons and his wife to the wife of Mohr.

The referee found that John H. Mohr was indebted to Meyer at the time of the conveyance of the real estate, and that Meyer recovered a judgment against Mohr for such debt, which was duly docketed, and a transcript filed in the proper county clerk's office; that an execution was issued thereon to the sheriff of the county where Mohr then resided, which was returned thereafter wholly unsatisfied, and filed in the proper clerk's office before the commencement of this action; and the referee also found that the conveyance was made with intent to defraud Mohr's creditors. Judgment was thereupon rendered in favor of the plaintiff, adjudging the conveyances to be void, and ordering the defendants, Mohr and wife, unless the plaintiff's demand, with interest and costs, were paid in five days after notice of the judgment, to convey the real estate in question to a receiver, who was directed by the judgment to sell the same, and apply the proceeds, after payment of expenses, &c., to the satisfaction of the plaintiff's demand, with interest and costs, and dismissing the complaint without costs as to Emmons and wife.

The defendants, Mohr and wife, excepted to the findings of the referee, and appealed from the judgment.

John L. Cadwalader, for defendants, appellants.—I. The present action is intended as an action under the Revised Statutes, after the issue and return of an execution unsatisfied; and to sustain the bill under the Revised Statutes a proper execution must be issued, and properly returned and filed. (2 *Rev.*

Stat., 173, §§ 38, 39; Crippen *a.* Hudson, 3 *Kern.*, 161; Forbes *a.* Logan, 4 *Bosw.*, 475; Chautauque Co. Bank *a.* White, 2 *Seld.*, 252.)

II. The referee erred on the trial in admitting the papers offered in evidence as executions, and erred in finding, as a finding of fact, that an execution on the judgment had been duly issued and returned unsatisfied.

1. Not only not the best evidence, but no evidence at all, was produced. For any thing that appeared to the contrary, the paper offered may have been drawn up an hour before the trial.

2. No evidence was offered as to the issuing of the execution, or that the defendant resided, at that time, in the city and county of New York.

3. No evidence was offered that the execution was ever in the hands of the sheriff—that any indorsement thereon was made by any person officially—nor was the handwriting proved.

4. No evidence was offered as to the custody of the execution, or that it was or had been on file. The return is not complete until it reaches the place of final deposit. (Beck *a.* Burdett, 1 *Paige*, 305; Garlic *a.* Sangster, 9 *Bing.*, 46; Fager *a.* Campbell, 5 *Watts*, 288; Welsh *a.* Joy, 13 *Pick.*, 482; Winslow *a.* Pitkin, 1 *Barb. Ch.*, 402.)

5. After the execution was returned, it then became a record of the Superior Court, and could only be proved as such. (1 *Greenleaf's Evid.*, § 521, 7 ed.; 2 *Phillips' Evid. C. & H.* n., p. 376 (n) 4 Am. ed.; Brush *a.* Taggart, 7 *Johns.*, 19; Jenner *a.* Joliffe, 6 *Johns.*, 9; Foster *a.* Trull, 12 *Johns.*, 456.)

III. The referee erred in refusing to dismiss the complaint, on the ground that the remedy at law had not been exhausted. (Forbes *a.* Logan, 4 *Bosw.*, 475, Bosworth, J.; Cassidy *a.* Meacham, 3 *Paige*, 311; Cases on Point 3d.)

IV. The referee erred in refusing to admit the evidence offered, that defendant had ample property to satisfy the judgment.

1. The evidence was material, as the defendant was charged with a fraud. (Tappan *a.* Butler, 7 *Bosw.*, 481.)

2. It was an issue in the case. The answer denied the issuing of the execution.

3. The evidence was material to show the remedy at law had not been properly exhausted.

4. The evidence was material, as the defendant's personal property must be first applied to satisfy the judgment.

V. The referee erred in rejecting the evidence offered to impeach the credibility of Degener, a witness; and erred in finding as matter of fact that the defendant's shop property was of no value.

VI. The referee erred in his estimate of the defendant's property, and of his debts.

VII. The referee erred in finding that conveyances in question were fraudulent. It is settled in this State that a voluntary conveyance, by one indebted at the time, is valid, where the grantor is solvent, and retains ample property to satisfy all his creditors. (3 *Rev. Stat.*, 5 ed., 225, § 4; Carpenter *a.* Roe, 10 *N. Y.*, 227; Seward *a.* Jackson, 8 *Cow.*, 406; Hinde's Lessee *a.* Longworth, 11 *Wheat.*, 213; Verplank *a.* Sterry, 12 *Johns.*, 536; Bank U. S. *a.* Houseman, 6 *Paige*, 526; Jackson *a.* Post, 15 *Wend.*, 593; Jackson *a.* Peek, 4 *Wend.*, 300; Planck *a.* Schermerhorn, 3 *Barb. Ch.*, 644; Babcock *a.* Eckler, 24 *N. Y.*, 623; Tappan *a.* Butler, 7 *Bosw.*, 480.)

1. The defendant retained ample property to pay all his debts. He even offered to show he possessed it at the time of the judgment. It has never been claimed the defendant was or became insolvent. It is inability, not unwillingness to pay, that renders a conveyance fraudulent.

2. No fraud, or intent to defraud, is shown, which is requisite under the Revised Statutes. (3 *Rev. Stat.*, 5 ed., 225, § 4.)

William Ware Peck, for plaintiff, respondent, as to the evidence of the return of the execution, cited 1 *Rev. Stat.*, 4 ed., 330, §§ 22, 27; Hyskill *a.* Givin, 7 *Serg. & Rawle*, 369; 1 *Phillips on Evid.*, 391; Dutton *a.* Tracy, 4 *Conn.*, 79; Russell *a.* Gray & Margerson, 11 *Barb.*, 541; Baker *a.* M'Duffie, 23 *Wend.*, 289; Cornell *a.* Cook, 7 *Cow.*, 310; Browning *a.* Hanford, 5 *Denio*, 586; Henderson *a.* Cairns & Henderson, 14 *Barb.*, 15; Sheldon *a.* Payne, 3 *Seld.*, 453; Wardnell *a.* Patrick, 1 *Bosw.*, 406; Savacool *a.* Boughton, 5 *Wend.*, 170; Henry *a.* Lowell and others, 16 *Barb. Sup. Ct.*, 268; *Cow. & Hill's Notes to Ph. Ev.*, n. 740, p. 1083; *Ib.*, n. 734, p 1076; *Cow. & Hill's Ed. of Ph. Ev.*, vol. i., p. 391; *Cow. & Hill's Notes to Ph. Ev.*, n. 741, p. 1096; 1 *Greenl. Ev.*, §§ 501, 502.

By the Court.*—White, J.—In support of the appeal, the defendant alleged, in substance:

1st. That the defendant Mohr was not insolvent, or in such embarrassed circumstances at the time of the conveyance of his real estate to his wife, as to render the conveyance void as against his then existing creditors; and that neither upon that, nor upon any other ground, was the conveyance void.

2d. That there was no sufficient proof given before the referee that the execution issued upon the judgment recovered by Meyer against Mohr, was returned by the sheriff, and filed in the clerk's office before the commencement of the present action.

3d. That the present action was brought without cause, and in bad faith, the defendant having ample personal property subject to levy, from which the execution might have been satisfied if the plaintiff or the sheriff had honestly attempted to collect it; that the plaintiff was, therefore, not entitled to bring the action, and the complaint should be dismissed.

The judgment was also objected to as not recognizing or providing for the wife's right of dower.

But none of these objections appear to have been sustained by the proof before the referee.

The assets or personal property remaining in Mohr's hands, after he had conveyed his real estate to his wife, formed a very unreliable and insufficient security for the payment of his debts, especially when the probable necessary and reasonable demands for the support of himself and his family, to which it might be subjected, should be taken into account and deducted from it. And Mohr seems to have been conscious of that fact himself, as appears from the testimony of Schafer, who states that Mohr said that he must have time to enable him to pay Meyer and Humerhoff, and that it would ruin him if they enforced immediate payment; and to the same effect was the testimony of Humerhoff and of Steinheimer; and the testimony of these witnesses shows, also, a deliberate fraudulent intent, on the part of Mohr, to hinder and delay his creditors.

The proof of the issuing, return, and filing of the execution before the commencement of this action was sufficient. It con-

* Present, Bosworth, Ch. J., White and Monell, JJ.

sisted of the execution and the indorsements upon it by the sheriff and clerk respectively, showing its receipt and return by the sheriff, and its filing in the clerk's office, and the statement of the witness Newman, that he saw it on file in the clerk's office. The testimony of Newman is not as pointed as it should be in its designation of the process which he saw on file; but it is reasonable to assume that he intended, or referred to the execution in the suit of Meyer *a.* Mohr.

The proof does not show that there was sufficient property of the defendant, besides the real estate, that might have been levied upon; and the testimony that was offered by the defendant, and excluded, does not appear to be material. The return of "no property" by the sheriff, upon the execution, was sufficient to justify the institution of the present action. To show that there was some personal property that might have been seized, would not affect the plaintiff's rights, unless it was also shown that he knew of its existence, and omitted to act upon it. The testimony of Degener, respecting the value of the defendant's tools, was not important. Taking Mohr's own statement of their value, and rejecting Degener's altogether, would not materially alter the facts from those found by the referee.

And with respect to the omission in the judgment to provide for the defendant Margarita's dower in the real estate, it is only necessary to observe, that having united in the fraudulent deed of the property to Emmons (the party through whom the real estate was transferred to her), she thereby divested herself of her inchoate right of dower, and must abide the consequences.

The judgment must be affirmed with costs.

PURCHASE *a.* BELLOWS.

New York Superior Court; General Term, November, 1862.

EXECUTION AGAINST THE PERSON.—ARREST FOR COSTS.

A defendant succeeding, and recovering judgment for costs, in an action to recover the possession of specific personal property, in which no order for his arrest has been made, cannot issue execution against the person of the plaintiff upon such judgment.*

Appeal from an order granting a motion by the plaintiff to set aside an execution against his person.

This action was brought by John Purchase against George F. Bellows, to recover the possession of certain personal property alleged to be wrongfully detained, with damages for its detention.

Judgment was rendered in favor of the defendant for

* In the case of McKAY *a.* DRAPER (*Supreme Court, First District; Special Term, November*, 1863), the rule laid down in Alden *a.* Sarson (4 *Ante*, 102), that an execution against the person cannot issue in an action on contract, not sounding in tort, unless an order of arrest was made in the action, was followed, though with some hesitation.

INGRAHAM, J.—The defendant was arrested on an execution against the person, and now moves for an order to set aside the execution.

This depends upon the character of the action. The complaint is for money held by him upon certain conditions, which he has neglected to pay over. It is not a complaint for any tort, and the liability of the defendant is clearly that of a bailee.

There may be some doubt whether, in such an action, where the bailment is set out in the pleadings, the defendant may not be arrested; but as the point has been decided by one of the judges of this district, in Alden *a.* Sarson (4 *Abbotts' Pr.*, 102), I think best to follow that decision until reviewed by the general term. In that case, the judge held that the defendant could not be arrested on execution without a previous order. As there was no order in this case, the motion must be granted on defendant's stipulating not to bring an action. As the plaintiff may desire to submit the question to the general term, he may have a stay of proceedings on this order, for the purpose of an appeal.

Motion granted, on defendant's stipulating, &c.

the costs of the action. After an execution upon this judgment, issued against the property of the plaintiff, had been returned unsatisfied, the defendant issued an execution against plaintiff's person. The plaintiff moved at chambers to set aside this execution, and the motion was granted. The decision is reported 14 *Ante*, 357.

From the order setting aside the execution the defendant appealed to the court at general term.

W. Wells, for the defendant, appellant, cited Roberts *a.* Randell, 3 *Sandf.*, 709; Chappel *a.* Skinner, 6 *How. Pr.*, 339; Kloppenberg *a.* Neefus, 4 *Sandf.*, 655; Merritt *a.* Carpenter, 30 *Barb.*, 61; Brush *a.* Mullen, 12 *Abbotts' Pr.*, 242; *Code*, § 288.

Thos. Stevenson, for the plaintiff, respondent, cited *Code*, § 179, subd. 3; *Ib.*, § 206; Chappel *a.* Skinner, 6 *How. Pr.*, 338; Mulvey *a.* Davidson, 8 *How. Pr.*, 111; *Code*, § 167, subd. 6; *Hoffman's Provisional Remedies*, 9, 23, 106; 3 *How. Pr.*, 297; 18 *Ib.*, 94; *Code*, § 289, subd. 4; *Ib.*, § 288.

By the Court.*—Bosworth, Ch. J.—This is an action to recover the possession of personal property. No order for the arrest of the defendant was obtained. He succeeded in the action. Can an execution issue against the person of the plaintiff for the costs? If the plaintiff had succeeded, no execution against the person could issue against the defendant. (*Hoff. on Prov. Rem.*, 22, 23.) The plaintiff cannot be arrested, unless a plaintiff who fails to recover, and against whom a judgment is rendered for costs, may be subjected to execution against his body, in an action where no such execution could issue against the defendant, if the plaintiff had succeeded. Section 178 [153] declares that no person shall be arrested in a civil action, except as prescribed by that act.

The order should be affirmed.

Order affirmed, with ten dollars costs.

* Present—Bosworth, Ch. J., and Mosorief, Robertson, Barbour, and Morell, JJ.

GRANTMAN *a.* THEALL.

Supreme Court, Seventh District; General Term, March, 1865.

GUARDIAN AD LITEM.—SECURITY FOR COSTS.

A defendant sued by an infant plaintiff who appears by a *guardian ad litem*, is not entitled to require the guardian to give security for costs.

The provisions of the Revised Statutes requiring the next friend of an infant plaintiff to give security for costs, do not apply to a *guardian ad litem* for an infant plaintiff, appointed under the provisions of the Code of Procedure.*

Appeal from an order vacating an order requiring security for costs.

The plaintiff in this action was an infant, appearing by John Grantman, his *guardian ad litem*, appointed under the provisions of the Code of Procedure.

On the 9th of February last, the defendant presented to Mr. Justice E. D. SMITH, at chambers, an affidavit, stating among other things that the plaintiff was an infant, and that his guardian was irresponsible, and that costs could not be collected of him; and thereupon the justice granted an alternative

* It is generally agreed that the provisions of the Revised Statutes on the subject of security for costs, are not *repealed* by the Code of Procedure. The extent to which the case in the text goes, is to hold that the part of those provisions which relate to the next friend of an infant, is not applicable to a guardian of an infant plaintiff under the Code. (Compare Rutter *a.* Puckhoffer, 9 *Bosw.*, 639.)

It is to be observed, however, that the court have power to require security for costs, in their discretion, independent of the authority given by statute. (People *a.* Oneida C. P., 18 *Ward*, 652; Swift *a.* Collins, 1 *Den.*, 659; Dyer *a.* Dunivan, 3 *How. Pr.*, 185.) It is a common-law power akin to that which the courts exercise in staying proceedings in a second suit, until costs of a former suit on the same subject shall have been paid. (Compare Jackson *a.* Miller, 3 *Cow.*, 57; Jackson *a.* Edwards, 1 *Ib.*, 138.)

It is undoubtedly a very common practice to deny applications for security upon the ground that a case within the statute is not made out; but it may very well be that the court have *power* to require it in their discretion, and in a proper case would do so. (Compare, further, Fulton *a.* Rosevelt, 1 *Paige*, 178; Tenbroeck *a.* Reynolds, 13 *How. Pr.*, 462.)

order requiring the plaintiff to file security for costs. On the 13th of February, both parties having appeared before the justice, and having been heard by him, he made an order vacating the order granted on the 9th, and from the order last made the defendant now appealed.

By the Court.*—E. Darwin Smith, J.—In the Revised Statutes (chap. 8, title 2, part 3, marg. p. 445; vol. 2 of 3d ed., p. 543), it was provided as follows:

"§ 1. When an infant shall have any right of action," . . . "he shall be entitled to maintain a suit thereon" . . . .

"§ 2. Before any process shall be issued in the name of an infant, who is sole plaintiff in any suit, a competent and responsible person shall be appointed to appear as next friend for such infant in such suit, who shall be responsible for the costs thereof."

In title 2 of chapter 10 of the Revised Statutes (vol. 2, marg. p. 620), it is provided, that, among other cases, "when a suit shall be commenced in any court, ... in the name of any infant, whose next friend has not given security for costs, the defendant may require such plaintiff to file security" for costs; and also, that when security for costs may be required by the provisions of that title, the plaintiff's attorney, instituting such suit, shall be liable for costs to an amount not exceeding $100. Section 8 of the same title 2, of chapter 8 (marg. p. 446; 3d ed., vol. 2, p. 542), also provided that "after the issuing of process against any infant defendant by which he shall have been arrested, the suit shall not be any further prosecuted, until a guardian for such infant be appointed."

It will thus be seen that the Revised Statutes provided, that an infant plaintiff shall sue by a next friend, and that an infant defendant defend by guardian; and such was the practice in this State, under this statute, before the Code of Procedure, and such was the previous rule at common law. In the Code (§ 115), it was provided that "when an infant is a party, he must appear by guardian;" and section 316 is as follows: "When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be respon-

* Present, Johnson, P. J., James C. Smith and E. D. Smith, JJ.

sible therefor, and payment thereof may be enforced by attachment."

The Code thus introduced a new practice. It dispensed with the "next friend" of the common law and of the Revised Statutes, and substituted in his place a guardian for the infant, by whom the infant is both to sue, when he is plaintiff, and by whom he is to appear, when sued, as defendant. The provision of the Revised Statutes requiring the next friend of an infant plaintiff to give security for costs, does not apply to the guardian of the Code. The guardian is liable for costs, the payment of which, as above stated, may be enforced by attachment. The Legislature made a distinction between the next friend and the guardian of an infant, in the Revised Statutes, and also in the Code; for in section 114 of the Code, in the amendment of 1857, it is provided that a married woman (who in the amendment of 1851, and previously at common law, was required in most cases to sue by a next friend), "need in no case prosecute or defend by guardian or next friend," and there was ever a distinction between the name and office of next friend (*prochein ami*) and guardian, at common law. I cannot see, therefore, how we can apply the provision of the Revised Statutes, requiring the next friend of an infant plaintiff to give security for costs, to the guardian of the Code. It is not necessary to say that this provision is repealed by implication. It does not in terms apply to the guardian. The Legislature has not so applied it, and we are simply to decide that there is no express provision in the statute requiring a guardian, as such, and who sues for an infant plaintiff by that name—a name well known and recognized at law—to give security for costs.

This question was so decided in this court, at an early period under the Code (March term, 1851), in the suit of Catharine Vernon, by her guardian, against William C. Butler. In that case, costs being awarded against the plaintiff, an order was made at special term that the attorney pay the same; no security for costs having been filed by the guardian. This order was reversed at the general term, on the ground, as we understand, and as we must hold in this case, that the guardian was not bound under the Code to give security for costs, and that the provision of the Revised Statutes requiring the next

friend of an infant to give security for costs, did not apply to such a guardian.

I think the Legislature intended to introduce a new rule and a new practice on the subject, and that the plaintiff was not bound to give security for costs, and that the order of the judge below should, therefore, be affirmed.

JOHNSON, P. J., concurred.

JAMES C. SMITH, J. (dissenting).—The Revised Statutes provide (2 *Rev. Stat.*, 620, § 1, subd. 5), that when a suit shall be commenced in the name of any infant whose next friend has not given security for costs, the defendant may require such plaintiff to file security for costs. The only question presented by the appeal is, whether this provision is applicable to the case of an infant suing by guardian, as provided by the Code of Procedure (§§ 115, 116). The plaintiff insists that, as before the Code the provision referred to applied only to cases where a next friend was required to be appointed (2 *Rev. Stat.*, 446, § 2, 3 ed.; 4 *How. Pr.*, 93), it is abrogated by the Code, which expressly provides that when an infant is a party he shall appear by guardian (§§ 468, 469). I have attentively considered the argument submitted by the plaintiff's counsel, but it has failed to convince me that the Legislature, in directing that infants shall in all cases appear by guardian, intended thereby to relieve a sole infant plaintiff from the requirement of the statute to file security for costs.

Obviously, one object of the Code in this change, if not the only one, was to dispense with the terms "next friend" and "*prochein ami*," and to apply a uniform term of designation to the person by whom an infant may appear in an action, whether such infant is plaintiff or defendant, sole party or joined with others. But notwithstanding the change of name, the duties and responsibilities of such person, towards the infant at least, remain the same as formerly; he is to the infant plaintiff precisely what a "next friend" was before the Code. Not only is this true of his liabilities at common law, but also of those imposed by statute. The Revised Statutes provide that in certain cases the next friend shall, if required by the officer to whom application is made for his appointment, exe-

cute a bond to the infant, conditioned to account to him for all moneys recovered in the suit. (2 *Rev. Stat.*, 446, 3 ed., §§ 5, 6, 7.) I apprehend this provision is still in force, and applies to the guardian of an infant plaintiff, appointed as provided by the Code.

Yet, if the position of the plaintiff's counsel is correct, this provision, which was intended solely for the benefit of the infant, is also repealed by the change of name. I do not think the Legislature so intended.

If, then, the Legislature, by substituting the term guardian for that of next friend, have not discarded any former rule designed for the protection of the infant, what reason is there for supposing that they intended to abrogate the wholesome statute requiring security for the costs of the defendant? They have not done so in express terms; there was no necessity of resorting to doubtful language, and a repeal by implication is not to be favored. The plaintiff's counsel suggests that the words "guardian" and "next friend" or "*prochein ami*" have an ancient, fixed, and technical meaning, and were never synonymous, and the Legislature must be understood to have employed them in their technical sense. In fact, however, they have not a well-defined, distinct, and technical meaning. Originally, at common law, the guardian of the infant was the person to prosecute as well as defend suits in his behalf. But as guardians were sometimes themselves the very persons who disturbed and injured the infants in their rights, the Legislature at length interposed, and by statute (1 *Westm.*, ch. 48) enacted, "that if an infant be eloigned or disturbed by his guardian or feofee, or any other, whereby he cannot prosecute his assize, any one of his nearest friends who pleases may sue for him." Afterwards, by the statute of 2 Westm., chap. 15, a general privilege was allowed in all cases for minors to sue by their next friend, who was to be admitted for that purpose. (2 *Sellon's Pr.*, 64.) In the books, the names of guardians and *prochein ami* are oftentimes taken the one for the other, because it frequently happens that they used to be one and the same, as the guardian in socage was also *prochein ami*, &c. (*Ib.*) After the statute of 2 Westm., it seems to have been the rule that an infant shall sue by *prochein ami* and defend by guardian; but even then the distinction was one of terms merely,

for as well the guardian as the *prochein ami* could only be admitted on proper petition and application to the court; and any person who, as friend to the infant, was willing to prosecute or defend for him, was competent to be so admitted. (*Ib.*) It is difficult, therefore, to discover any substantial difference in the meaning of the terms, which furnishes a reason for requiring an infant plaintiff to give security for the defendant's costs when he appears by next friend, and relieving him from that requirement when he appears by guardian.

The plaintiff's counsel draws another argument from the fact that the Code of 1848 did not make guardians liable for costs, and the Legislature supplied the omission in 1849 by section 316 of the Code. It is argued that, as there was then a statute in force making the next friend liable (2 *Rev. Stat.*, 446, § 2), the legislation of 1849 would have been unnecessary, if next friend and guardian were considered the same thing. But by a similar argument, the provision of the Revised Statutes last above referred to might be shown to have been unnecessary, since at common law the next friend was liable for costs. (*Wille's R.*, 190; 11 *Wend.*, 164). The answer is, that the statute was declaratory merely (Revisors' notes, 5 *Rev. Stat.*, Edm. ed., 479); and so is section 316 of the Code, not only in making the person by whom an infant plaintiff sues liable for costs, but also in subjecting him to attachment. (2 *Sell. Pr.*, 67; *Tidd's Pr.*, 72).

It is also argued by the plaintiff's counsel, that if security can be required in this case, the attorney is liable for costs, if it is not given, under section 7 (2 *Rev. Stat.*, 620); and as that section did not apply to suits in the Court of Chancery (9 *Paige*, 381), this court must either reverse the rule of chancery and extend the statute to equitable as well as legal actions, or else the liability of the attorney must depend on the nature of the suit. It is unnecessary now to consider the question whether, under our present statutes, the liability of the attorney exists in all cases, or only in actions of a legal nature, as that question is not before us; but it is enough to say that no practical difficulty and no injustice would result from holding that it exists in all legal actions at least, and hence the argument does not appear to be of much weight in the present case.

I am of opinion that the order appealed from should be reversed.

Order affirmed.

MOSS *a.* PRIEST.

New York Superior Court; General Term, April, 1863.

VERDICT.—AMENDMENT.

The rendering of a general verdict by a jury and its reception by the court, without objection, either by the judge or the parties, is good, notwithstanding the failure of such jury to find upon certain special questions of fact, upon which the court, in the course of its charge, directed them to find.

Where the court instruct the jury, if they render a general verdict, to find also upon particular questions of fact by answers in writing, and the jury render such general verdict, but make by their foreman merely oral replies to such questions, every party who does not object at the time waives his right, if any, to have written answers made to such questions; while the court, by receiving such general verdict, without insisting upon written answers signed by the jurors, must be deemed also to have withdrawn the instruction to answer such questions, so that the general verdict stands unaffected by any oral answers given by the jury to such questions.

Where in such a case an application is made by either party to have the answers as actually given by the foreman inserted in the record, the adverse party, if he has done no act to waive the objection to the mode of answering not being in writing, may show that the answers actually given by the foreman were not those which the jury intended. Any amendment, if allowed, should be only to conform the whole finding of the jury, including the general verdict, to the answers intended, and not to those erroneously given by the foreman.

Appeal from an order amending a verdict.

The action was tried before one of the justices of the court and a jury. At the close of the evidence the presiding justice directed such jury to bring in a general verdict; and also to answer in writing certain written questions presented to them by him, affirmatively or negatively, according to their opinion, as to how they should be answered from the evidence.

The jury rendered a general verdict in favor of the plaintiff. But their foreman, when called upon by the clerk of the court for their answers to such particular written questions, through some misunderstanding, answered all of them orally in the affirmative; but no entry was made in the minutes respecting them, or such answers.

The defendant then moved at special term to correct the verdict, by directing the answers so given to the questions to be entered upon the minutes. A statement of some of the jurors was produced upon the motion, by which it appeared that no written answers to the questions had been made by them; that the oral answers actually given were in the affirmative; but that to two of such written questions the jury intended to have answered in the negative.

The motion was granted, and the answers actually given ordered to be inserted in the minutes. From this order the plaintiff appealed.

S. P. Nash, for the plaintiff, appellant.

F. Bryan, for the defendant, respondent.

By the Court.*—Robertson, J.—The Code of Procedure provides (§ 261) that the court may in all cases instruct the jury, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon, and which special finding shall be filed with the clerk and entered on the minutes.

In the present case, questions of fact were stated in writing by the presiding justice, and the jury were directed to answer them in the affirmative or negative, as under the evidence they thought proper. They took with them, on retiring to deliberate, the written questions; and on returning into court, besides giving a general verdict, stated orally, in answer to a question of the clerk, that they answered all such written questions in the affirmative; but they signed no written finding thereon. No entry was made, in the minutes, of their answers thereto, at the time of the trial.

* Present, Robertson and Mowell, JJ.

It is very plain from the jurors' subsequent statement, that the entry, which the order appealed from directed to be made on the minutes of the court, of their response to the questions put, is not what they wished or intended it to make. They evidently misunderstood the inquiry addressed to them by the clerk in regard to such questions, and answered under that misapprehension. To allow it to stand, would make the verbal answer given through mistake (perhaps of the foreman) take the place of the written answer required by the statute, to the prejudice of the plaintiff. The occurrences in this case are a full illustration of the prudence of the provision which requires the answer or findings to be in writing. If the jurors had been called upon separately to write their answer to each question separately, they would most probably have avoided any mistake. The provision of a statute which requires any document to be in writing, ought not to be dispensed with to work a wrong, or accomplish exactly the reverse of what the parties who ought to have signed the writing intended. The answers entered were, in reality and in substance, not theirs, although they might have been in sound.

Not being in writing, the findings on the submitted questions should be considered as out of the case,—in other words, as if the jury had failed to answer them in any way; and the question then arises, whether the rendering of a general verdict, and its reception by the court without objection, either by the judge or the parties, is not good, notwithstanding the jury have failed to answer special questions. The submission of special questions to a jury to be answered by them in addition to a general verdict, of which such answers form no part (*Code*, § 262; see, also, Thompson *a.* Button, 14 *J. R.*, 84), seems to be entirely a matter of discretion with the court; neither of the parties can require it as matter of right. If they need a finding upon special questions, they must apply to the court, in advance of the trial, for an order to that effect. Being a matter of discretion, I apprehend the court can withdraw the direction at any time before the special finding is given, and the general verdict can be received without it. No vested right is acquired by either party to have the findings given, because the court has once so directed it. There is always, therefore, room for withdrawing such directions and receiving

a general verdict up to the time of signing the findings, and filing them and entering them on the minutes, or for the court to exercise its discretion as to receiving them. Suppose jurors are ready to bring in a general verdict, if the court should not insist on answers to the special questions, could not the latter be withdrawn? To doubt that power would convert the discretion of the court into the right of the parties. In this case, a general verdict was received and entered by the clerk without objection by the parties. Something else, it was true, was said by the jurors at the time, but not put in writing and signed by them, or read over by the clerk or entered by him in his minutes. This waived all objection by the parties to the receipt of the general verdict, and precluded either from insisting afterwards, either that such verdict was irregular, or that entries should be made of a verbal response to some questions in order to control it.

As the Code gives to a special finding of facts by a jury the power of controlling a general verdict, if the two are inconsistent, and the court is required to give judgment accordingly (§ 262), such judgment must be specially applied for, in order to determine such inconsistency and its extent; and an appeal would lie for error in giving such judgment. Requiring a jury to answer specially is, therefore, such a different direction as to prevent the clerk from entering the judgment under section 264, according to the general verdict. He cannot determine what judgment is to be entered.

The object of the provision in regard to special findings was to enable the court to leave the case to the jury generally, but to control their general verdict by findings which would render a second trial unnecessary in cases where no exceptions were taken, or rather to prevent the necessity of exceptions to the charge. If, in such cases, the court instruct a jury to find for either party, provided they find in a certain way upon certain questions of fact, such instructions would be subject to exceptions, and error in any of them would send the case back for a new trial. The result would be the same on special findings, as if the court on the trial had charged as might be determined by itself, on more mature reflection and argument when application is made for judgment, it ought to have charged; or if there was no room on the evidence to submit

such questions to the jury, the general verdict rendered might be allowed to stand. The general verdict, as regards the particular questions submitted, becomes a mere matter of form. It is, in fact, merely a mode of having exceptions to the charge argued and carefully decided on a fuller examination than can be given them on the trial, without the necessity of a new trial in case of a mistake. Either party has a right to require a positive instruction to the jury upon matters embraced by such special findings, if raised by the evidence; and to except to a refusal to charge as requested, or to the charge as actually given. But they cannot complain of a course which submits such special questions for special findings thereon in any event.

If the exceptions in this case cover the same ground as the special findings would, in this case, if they had been made, since the former are to be heard at general term first, the defendant will have every benefit derivable from them. If they do not, the fault is his. I do not see that he will be more prejudiced by the omission of the jury to answer in writing the question submitted, than by his own neglect in requiring a specified charge in relation to the same matter.

No verdict was rendered in this case, except the general verdict; and the jury did not answer in legal form the questions which could modify such verdict, and did not intend to answer as it is proposed they should be made to do. All authorities therefore cited in regard to amending verdicts are inapplicable.

If the defendant seeks to amend any defect, it should only be done by conforming the verdict to the actual intention of the jurors—to what they would have done, had an opportunity been afforded them of complying with the terms of the law. The slip, if it can be so called, of taking answers verbally, can only be corrected by amending the equal mistake in the language used by the jurors, or rather their misapprehension of the clerk. The statement of the jurors was not used to contradict their verdict, but to prove that they had never signed a finding in writing, and that what they said verbally was not intended to be as it was understood. If a verbal answer taken down by the court or the clerk is a substitute for the signature in writing required by law, what the jurors intended by such

verbal answer, of course, cannot be proved by their statement. Their intention is only important to show, that they would not have signed such a written statement as the defendant claims they intended to sign; and their present statement is admissible to prove that. At all events, there is no evidence before us that any similar objection, or one that their statement was not sworn to, was taken on the hearing of the motion at special term. The objections should there have been made that they were incompetent witnesses to prove the facts they stated, and that their statement consequently must be excluded, if the defendant intended to rely on that objection.

Of course, if the verbal answer had been equivalent to a written one, the court had the power to amend the clerical error of omitting to insert it in the minutes. But how, in that event, is judgment to be entered in this case, or the exceptions heard, which is ordered to be done at general term? The former, of course, is to be suspended, until the latter are heard, according to the order made at the trial of the case. But if a new trial is refused on the exceptions, can a motion be made afterwards, at special term, by the defendants, for judgment, because the special findings overrule the general verdict? That would make the case heard at a general, before it was heard at a special term. In arguing his exceptions first, the defendant admits that judgment must be given for the plaintiff, if his exceptions fail: which is the only reason why the Code permits the excepting party to be first heard at general term. Why should the plaintiff be put to the expense of arguing the exceptions, if the defendant may have a right to judgment on the special findings to be afterwards pressed by him?

It was, of course, immaterial to the defendant, whether the supposed answers to the special questions by the jury were placed on the record or not, unless their effect was to overthrow the general verdict for the plaintiff. If that were so, he was bound to elect whether he would try to have the verdict and judgment in his favor, on one ground, or a new trial on the other, and not first get or be defeated on the latter, and then fall back on the former.

Considering, therefore, that the defendant's counsel must be deemed to have waived all his right, if any, to a written answer to the special questions put to the jury, by not objecting to the

general verdict without them; that the court also in receiving the general verdict without insisting on the jurors' signing a written answer to such questions, by not passing on the effect upon the general verdict of the verbal answer to such questions at the time of receiving the verdict, must be deemed to have revoked or withdrawn his requests or instructions to the jury to answer such questions; and that the plaintiff did no act to waive his right to have the questions answered in writing (if answered at all), the answers to which might overthrow the general verdict in his favor;—I think the general verdict should stand unaffected by the verbal answer given by the jury to such question.

Considering further that the plaintiff having done no act to waive any objection to the answers not being in writing, the defendant in applying to amend the record, not only by supplying an accidental omission, but also by making a verbal equal to a written answer, sought equitable relief, and he was bound to do equity by so amending the record as to make it conform to the intention of the jurors in their answer to the clerk's question as they understood it.

The order made should be reversed, unless the defendant will consent that the same be modified, so as to allow the jurors' answers to the second and third questions to be inserted as being in the negative.

LUPTON *a.* JEWETT.

New York Superior Court; General Term, April, 1863.

APPEALABLE ORDER.—ATTACHMENT.—WAIVER OF APPEAL.

An order appointing an appraiser to ascertain the value of property attached, for the purpose of discharging the attachment upon the giving of an undertaking, is not appealable. It does not involve the merits or affect a substantial right, but rests wholly in the discretion of the judge to whom the application is made.

Where an order is granted upon condition of payment of costs, accepting the costs under the order is a waiver of any right to appeal from it.

Appeal from an order appointing appraisers under section 241 of the Code.

The plaintiff, in this action, Edward Lupton, issued an attachment against the property of the defendants, James C. Jewett and others, and the same having been levied, the defendants applied to the justice issuing the attachment, upon affidavit that the value of the property was less than the amount claimed by the plaintiff, for the appointment of an appraiser, in order that they might have the attachment discharged on giving security in its stead.

The motion was granted upon the payment of costs, which the defendants paid. The plaintiff now appealed.

By the Court.*—Monell, J.—This is not an appealable order. The 240th section of the Code of Procedure provides, that the defendant in the action may apply to the officer who issued the attachment to discharge the same, upon delivering to such officer an undertaking in double the amount claimed by the plaintiff in his complaint. The 241st section provides, that if it shall appear by affidavit that the property attached is less than the amount claimed by the plaintiff, the officer issuing the attachment *may* order the same to be appraised.

The object of the appraisement is to relieve a defendant who desires to discharge the attachment from the necessity of giving security in an amount greater than the actual value of the property attached. Otherwise the undertaking would have to be in double the amount of the plaintiff's claim in the action, which frequently is much beyond the value of the property taken under the attachment. It is a mode of ascertaining the true value of the property, and does not impair or affect the provisional remedy of attachment given by the Code. Nor does such an order, in any degree, involve the merits of the action, or affect a substantial right. The attachment can hold such property only as is actually seized, and the undertaking given on the discharge of the attachment stands *in lieu* of the property attached. So that, if it be double the value of the property, no substantial right of the plaintiff can be affected.

* Present, Barbour and Monell, JJ.

There are analogous provisions in the Code, where the court is authorized to ascertain values for the purpose of fixing the amounts of undertakings; and it will not be pretended that an appeal from an order made for that purpose would lie. In an appeal from a judgment directing the delivery of possession of real property, there must be an undertaking, to stay execution, that the appellant will not commit waste; the amount of which undertaking must be fixed by a judge of the court. A reference for this purpose would be not only proper, but frequently necessary, to inform the mind of the judge. (*Code*, § 338.) So where the taking of an account is necessary for the information of the court, before judgment. (§ 271, subd. 2.) Orders made in these cases are not embraced among those made appealable by the Code. Another analogy is to be found in references to hear and determine the whole issues. Orders of reference in these cases, when the court had the power to make the order, have uniformly been held not to be appealable. (Bryan *a.* Brennon, 7 *How. Pr.*, 359; Dean *a.* Empire State Mut. Ins. Co., 9 *Ib.*, 69; Ubsdell *a.* Root, 3 *Abbotts' Pr.*, 142.)

The power given to appoint appraisers, leaves it entirely within the discretion of the judge or court, to whom the application is made; and the exercise of such discretion cannot be reviewed. He is the sole judge of the sufficiency of the proof upon which he makes or refuses the order.

The appeal is from the whole of the order, a part of which requires the payment of costs as a condition. I am of opinion that the plaintiff, having accepted the costs, is precluded from appealing, even if the order was an appealable order. (Radway *a.* Graham, 4 *Abbotts' Pr.*, 468.)

The appeal must be dismissed, with ten dollars costs to the defendants.

BRIGGS *a.* SWALES.

Supreme Court, Seventh District; General Term, March, 1865.

APPEAL IN SUMMARY PROCEEDINGS.—AMENDMENT.

Upon an appeal from the judgment of a justice of the peace in summary process to recover possession of land, if the appellant in good faith gives due notice of appeal, an omission through mistake to do any other act necessary to perfect the appeal or to stay proceedings,—*e. g.*, the giving of security,—is amendable by leave of the court.

Appeal from an order.

The plaintiff appealed from a judgment of a justice of the peace in summary proceedings to recover the possession of land, under chapter 193 of the Laws of 1849. The appeal was transmitted to this court by the County Court of Wayne, the county judge having acted as counsel in the proceeding before the justice, and being for that reason incompetent to hear the appeal.

The defendant moved at special term to dismiss the appeal, on the ground that no security had been given as required by law, and an order was made dismissing the appeal with costs, unless the appellant, within ten days, amend his appeal by giving the requisite security and paying the costs of the motion. From that portion of the order which allowed the plaintiff to amend by giving security, the defendant now appealed.

BY THE COURT.*—JAMES C. SMITH, J.—The only question is, whether the court has power to make such order. The last clause of section 327 of the Code of Procedure is in these words: "When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just." This clause clearly confers the requisite

* Present, JOHNSON, P. J.; JAMES C. SMITH and E. D. SMITH, JJ.

power, if it applies to proceedings under the act of 1849. Looking at the provisions of the Code alone, we find that section 327 applies to civil actions only (§ 8), including appeals to a County Court, from judgments rendered by justices of the peace in civil actions (§ 351). But section 5, subdivision 2, of chapter 193 of the Laws of 1849, provides that the proceedings authorized by that act before a justice, "may be removed by appeal to the County Court of the county, in the same manner and with the like effect, and upon like security, as appeals from the judgment of justices of the peace in civil actions; except that the decision of such county judge shall be an affirmance or reversal of such judgment, and be final."

The effect of this is to put such appeals on the same footing as appeals from judgments in civil actions in all respects, except as therein specified; and, in my judgment, it brings them within the operations of section 327 of the Code. It is true that, by the terms of the act, it is necessary to give security, in order to perfect the appeal (*Laws of* 1849, ch. 193, § 5, subd. 3; 24 *Barb.*, 438); but if notice of the appeal is given in good faith, the omission to give security through mistake presents one of the very cases which section 327 was designed to remedy. So in the case of appeal to the Court of Appeals, an undertaking must be executed "to render the appeal effectual for any purpose" (*Code*, § 334); nevertheless, section 327 is undoubtedly applicable to appeals of that nature.

The order should be affirmed, with ten dollars costs of appeal.

Order affirmed with costs.

HOFFMAN *a.* ÆTNA FIRE INSURANCE COMPANY.

New York Superior Court; General Term, December, 1863.

INSURANCE.—PARTIES.—PROOFS OF LOSS.—MEASURE OF DAMAGES.—CHARGE.—CASE AND EXCEPTIONS.

A policy of insurance issued to partners which contains a clause declaring it void in case of a sale of the property insured, without the consent of the insurers, is not annulled by a sale or release by one partner of all his interest to the others. (BARBOUR, J., dissented.)

The cases of Tillou *a.* Kingston Mut. Ins. Co. (7 *Barb.*, 70), and Wilson *a.* Genesee Mut. Ins. Co. (16 *Ib.*, 511), as to this point, approved.

Upon a loss after such release, the partners to whom the release was given can recover, in their own names, the whole loss under the policy, including not only the interest released, but also any loss to goods bought by them after the release.*

Where a policy declares that the value of the property shall be deemed what it may cost at the time of the fire to replace it, and also requires the preliminary proofs to state the actual cost of the articles, the insured are not bound by their statement of the actual cost from claiming that the value was a greater sum.

If the goods were those which the insured dealt in at wholesale or manufactured, the price for which similar goods were generally sold by wholesale dealers or manufacturers may be considered by the jury in estimating such value.

The failure of the insured to specify any of the goods with particularity, in their proofs of loss, if caused by their inability to do so in consequence of the total destruction thereof, does not preclude them from recovering for such goods.

The usual clause in a policy, that upon the happening of a fire the insured shall use all reasonable means for the protection of the property, &c., does not bind them to use any means to restore it to its previous condition, but only to take the necessary steps to prevent its deterioration and place it in a condition to be examined.

Thus where a large part of the goods were shirts, bosoms, and collars, most of which were injured only by water or by handling,—*Held*, that the insured were not bound to have them relaundried.

An erroneous assumption by the judge in charging the jury, that there is no controversy upon a particular matter of fact, is to be corrected, not by an exception, but by calling his attention to it that he may then correct it.

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* Upon an appeal to the Court of Appeals from the decision above reported, that court affirmed this decision, discussing at length, in the opinion delivered, the two points of law first above stated; and as to the remaining exceptions, approving the opinion of ROBERTSON, J., 32 *N. Y.*, 405.

Hoffman *a.* Ætna Fire Insurance Company.

The practice of including in a case questions withdrawn, answers excluded without objection, and testimony not necessary to raise the questions on the exceptions, or stated in too voluminous a form, reprehended by the court.

Appeal by the defendants from a judgment on a verdict recovered by the plaintiffs.

The action was brought by George Hoffman and William Place to recover on a policy of fire insurance issued by the defendants.

The policy was issued in February, 1861, to the firm of Hoffman, Place & Co., a partnership then existing, composed of the plaintiffs and one Silvernail. The latter withdrew from the business in March, 1862, and then released his interest in the partnership property to the plaintiff Hoffman, who, with Place, continued the business, which was that of manufacturers of, and wholesale dealers in, gentlemen's furnishing goods, under the firm-name of Hoffman & Place. Subsequently to this change in the partnership, the loss occurred.

The policy expressed that the defendants insured "Hoffman, Place & Co. against loss or damage by fire to the amount of six thousand dollars, on merchandise hazardous and not hazardous, their own, or held by them in trust or on commission, or sold but not delivered," contained in their store in the city of New York.

"And the said company do hereby promise and agree to make good unto the said insured, their executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, during the term of one year," . . . "the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen." . . . "*Provided*, that" . . . "if the said property shall be sold or conveyed, or if this policy shall be assigned without the consent of the company, obtained in writing hereon," . . . "this policy shall be null and void."

The conditions annexed contained, among others, the following usual provisions:

"VIII. In case of fire, or exposure to loss or damage thereby, the insured shall use their best endeavors to save and

protect the property, and the company shall not be liable for any loss sustained in consequence of neglect to do so . . . ."

"When merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged; and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity and cost of each. . . ."

"IX. Persons sustaining loss or damage by fire, shall forthwith give notice thereof, in writing, to the company, and, as soon after as possible, they shall deliver as particular an account of the loss and damage as the nature of the case will admit, signed with their own hands. . . . ."

"The cash value of property destroyed or damaged by fire shall be deemed to be such as it may cost at the time of the fire to replace the same."

The proofs of loss submitted by the plaintiffs to the defendants, after the fire, referred to a schedule annexed, exhibiting the merchandise partially damaged. This schedule contained two prices, affixed to each item, in separate columns, one headed "*cost*," and the other headed "*cash value*." The prices in the second column exceeded those in the former. The plaintiff claimed to be indemnified according to the latter value. In addition this statement of goods damaged, the proofs of loss contained a claim for goods lost and destroyed, which was made in the following terms:

"There was also lost, and destroyed by the fire, and in removing the said merchandise from the building, at the time of the fire, merchandise belonging to the undersigned, so far as can be ascertained, of about the value of $1,307.66."

The cause came on for trial on the 16th of February, 1863, before Mr. Justice MONELL and a jury.

At the close of the evidence, the defendant's counsel requested the court to instruct the jury as follows:

1. That the sale to Hoffman by Silvernail of his entire interest in the copartnership property, before the fire, without the knowledge or consent to the defendants, rendered the policy void; and that the plaintiffs cannot recover.

2. That, should it be held that the sale of Silvernail's in-

terest to Hoffman did not render the policy void, then Hoffman & Place can recover only to the extent of their original interest in the property of Hoffman, Place & Co., and not on account of any portion of the interest of Silvernail conveyed to Hoffman.

4. That the plaintiffs cannot recover in this action on account of the loss or injury to any goods or property purchased or acquired by them subsequent to the dissolution of the firm of Hoffman, Place & Co., and the sale of Silvernail's interest to Hoffman.

7. That the plaintiffs having stated the costs of the goods in the preliminary proofs of loss, are bound thereby, and cannot now claim that they cost any greater or higher amount.

These requests the court refused, and the defendants excepted.

8. That the plaintiffs cannot, in any event, recover for damage or injury to any goods, other than those set forth in the schedule attached to, and forming a part of, the proofs of loss, *except such as, from their total destruction, they could not specify with more particularity than they have done.*

The court charged thus as added to, and amended by, the words in italics. The defendants excepted to the amendment.

9. That if, at or about the time of the fire, it would have cost the plaintiffs the several sums mentioned in the proofs of loss to manufacture or procure the goods therein named, then the amount of the loss may be determined by deducting from the cost amount specified in the proofs of loss, the amount of the value of the goods in their damaged condition after the fire.

10. That the price for which goods similar to the stock in question were generally sold by, or purchased from, wholesale dealers and manufacturers, cannot be taken by the jury as the basis from which the cost to replace those goods can be calculated.

11. That the proofs of loss in reference to the sum of $1,307.66 are insufficient, and are not in compliance with the 9th condition of insurance; and that, as to that sum, the plaintiffs are not entitled to recover.

12. That the sale of Silvernail's interest to Hoffman, and his withdrawal from the firm, was a dissolution of it; and that,

therefore, any goods purchased by them, and added to the stock, are not covered by this policy.

These several requests the court refused, and the defendants excepted.

13. That the jury, in determining the amount of the loss, cannot take into consideration, or allow for, loss of business or trade, resulting from the happening of the fire, nor for loss of profits which, in the regular course of their business, the plaintiffs might have made upon their stock of goods, had it not been injured by the fire—*over and above the cash value thereof at the time.*

The court charged thus, with the addition of the words in italics. The defendants excepted to the modification.

The court also instructed the jury as follows:

"Where property has been totally destroyed, it is very difficult, if, indeed, it is not impossible, to furnish a particular description of the articles so destroyed; especially in cases where the books and papers of the establishment are lost also. Although the law requires a compliance with the condition contained in the policy of insurance, yet the only obligation in that respect which it imposes is, that the party insured shall furnish the best preliminary proofs in his power; and he is not required to do more than that. It will be for you to say, whether or not sufficient evidence has been given here to satisfy you of the actual loss of that portion of the property. So far as the preliminary proofs are concerned, that being a question of law, I state to you that the objection raised by the defendants upon that point is unavailable here; the preliminary proofs being sufficient to satisfy the conditions of the policy of insurance.

In furnishing their preliminary proofs, the plaintiffs gave both the cost or manufacturing price of their goods, and also the market value. Those distinct values were given in different columns in the same inventory. You will perceive that one of the conditions of the policy requires that the holders of the policy are to give the cost price of their property, and provides that after that is furnished the insurers and the insured are to ascertain its cash value; and therefore the plaintiffs, in giving those two columns, did nothing more than they were required to do by the conditions of the policy.

The only question of law which it is necessary for me to state to you relates to the rule of damages. I admitted testimony as to both the market value of the property in question, and the cost of its manufacture. I did so for the reason that at the time there was some doubt in my mind as to the correct rule of damages in this case; but a little reflection has satisfied me upon that point.

It is claimed, on the part of the defendants, that you are to take the cost of manufacturing the property as the basis of your calculation. I do not think that is the correct rule. You are to take, as the basis of your calculation of damages, the market value of the property at or about the 9th of April, 1862, the time of the happening of the fire. The reasonableness of this rule is obvious. There are a great many elements entering into the manufacture of goods, such as the species of labor employed and its value, the peculiar cunning in the art which one person possesses over another, the changes in the market of the price of the original material—these and other elements enter into the manufacture of different kinds of goods. If you are to take the cost price of manufacturing goods of the character of those involved in this case as your standard, you necessarily have to wait until the articles are manufactured; and according to the testimony of Mr. Hyatt, a very intelligent witness, it would take three months to manufacture them, during which time there would probably be a great change in their market value. Indemnity means making good. The insurers undertake by a policy of insurance, for a sufficient consideration, to make the insured good for any loss or damage by fire that may happen to the property upon which the policy is issued. The law makes general rules, and does not deal in exceptional cases; and the only safe rule in a case of this kind is to hold the insurance company to their contract of indemnity to make good to the insured the loss suffered at the time of the fire. If you take the market value, or, in other words, what it would have cost the plaintiffs at that time to go into the market and purchase the same kinds and quantity of goods as those which they lost, you have a basis upon which you can make your calculation of the damage sustained by the insured in this case.

I allowed evidence to be given of the cost of relaundrying

the goods injured by the fire; but the plaintiffs were not bound to relaundry the goods at all. They had a right, upon the happening of the fire, to claim the damages they had sustained by it; and the condition of the policy which provides that upon the happening of a fire the insured shall use all reasonable means for the protection of the property, does not mean that they shall apply any labor to the property more than is necessary in assorting and arranging the goods, that an examination may be made to ascertain the damage done to them. If relaundrying were a matter to be taken into consideration by you, you would have to wait and see what effect it would have upon the goods before you could fix the damage, and that could only be determined by the sale of the property afterwards. You have simply to take the market value of the property as the basis of your calculation.

To each of these paragraphs, the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiffs for $4,075.87, upon which judgment was entered; and the defendants appealed.

A. Wakeman, for defendants, appellants:—I. The judge erred in refusing to charge as first requested. That the sale to Hoffman by Silvernail of his entire interest in the partnership property before the fire, without the knowledge of the defendants, avoided the policy.

1. The defendants, by the policy, insured Hoffman, Place & Co. against loss or damage by fire, on merchandise, their own, or held by them in trust—that is, property of this firm or association, having in law a distinct existence as a single being, known and referred to by the name of Hoffman, Place & Co.

2. The sale by Silvernail of his interest to Hoffman operated as a dissolution of the firm; and from that moment the existence of this distinct, single legal being, known by the name of Hoffman, Place & Co., was annihilated.

3. Thereupon George Hoffman and William Place, by contract under the law, created a new, separate legal being, with entirely other and very different rights, known by the name of Hoffman & Place.

But these defendants never insured the property of this new

legal being or firm; they never contracted with it, nor even knew of its existence until after the fire. But this new legal being or firm having purchased the property of the old firm, now seeks in its own right to enforce this contract against these defendants. This we insist they cannot do. Suppose H., P., and S. had been incorporated under the name of H., P. & Co., and these defendants had by that name insured its property as such, and subsequently G. H. and W. P. should have been incorporated by the name of H. & P., and should then purchase the property of the former corporation, without these defendants' knowledge, and a loss should occur, will it be contended that the latter corporation could recover upon the policy issued to the former? Certainly not. Now, we submit, upon the same principle, one firm cannot recover upon a policy issued to another, except under a recognized assignment.

4. But if Hoffman, Place & Silvernail were simply joint contractors with these defendants, then the sale of Silvernail to Hoffman was a termination of his rights and interests in the property. Of course, he could not be damaged by the fire. The sale operated as a release of the defendants from any interest or rights he may have had under the contract. A release of one in a joint contract is a release of all. (Murdock *a.* Mutual Ins. Co., 2 *Comst.*, 210, 216, 218.)

5. The policy expressly provides that if the property should be "sold or conveyed" without the consent of the company obtained in writing upon the policy, the policy should be null and void.

The dissolution of the firm of H., P. & Co., and the transfer of the whole property to the new firm of Hoffman & Place, was such a sale or conveyance as rendered the policy void. (Murdock *a.* Mutual Ins. Co., 2 *Comst.*, 216, 218.)

While it may be said that this was a case of misjoinder, yet we submit the reasoning of the court covers this precise point, and is conclusive.

Tillou *a.* The Kingston Mutual Ins. Co. (1 *Seld.*, 5 *N. Y.*, 406), in which the decision in the general term, in the second district, upon this point in the same case (7 *Barb.*, 570), is reversed.

See, also, Grosvenor *a.* The Atlantic Ins. Co. (17 *N. Y.*, 391), where the case of Tillou (5 *N. Y.*) is reversed, but not upon

the point that the sale of the interest of one partner to his co-partners vitiates the policy. (See, also, 3 *Den.*, 301.)

Finlay *a.* The Lycoming Co. Mu. Ins. Co., 30 *Penn.* (6 *Casey*), 311, 313. This case is exactly in point, and is based upon the law as it was supposed to have been settled in this State. (See authorities cited by Mr. Parsons, arguendo.)

Dreher *a.* Ætna Ins. Co., 18 *Missouri* (3 *Bennett*), 128, 135, and 136. This case is also precisely in point, and settles the law in Missouri upon the authority of the cases in this State, above cited. (The opinion of Judge CADY, in 2 *Comst.*, in the Murdock case, is cited as conclusive.)

Dix and Others *a.* The Mercantile Ins. Co., 22 *Ills.*, 272, 277, and 276, is also in point. The cases in this State above cited are quoted as decisive of the point. We submit that the opinion of Mr. Justice BREESE, who delivered the opinion of the court, is conclusive.

Wood *a.* The Rutland Ins. Co., 31 *Vermont*, 552, 563. In this case, the court say, when one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss, and cites the New York cases as authority.

In this district, the general term have held the other way, in an opinion by Mr. Justice ROOSEVELT (16 *Barb.*, 512). The learned judge does not cite a single authority; and it may not be unjust to say that, amid the onerous duties of that court, the decision was made without very great deliberation.

It is true, this case is referred to with approval in Dey *a.* Poughkeepsie Ins. Co., 23 *Barb.*, 623, 627. But the point was in no way involved in that case, and of course it cannot be regarded as authority.

Upon this point we respectfully submit that the law and reason are both with the defendants.

II. The judge erred in refusing to charge, that if H. & P. could recover at all, it could be only to the extent of their original interests.

As to that, the sale operated precisely as if Silvernail had sold to a stranger. (Howard *a.* The Albany Ins. Co., per BRONSON, J., 3 *Den.*, 301, 305.)

He should have instructed the jury to deduct from the amount of goods claimed in the proofs of loss to have been on hand at the time of the fire, the amount of the Silvernail in-

terest conveyed to Hoffman. This was a quarter interest of the whole concern.

III. The judge erred in not charging the jury that the plaintiffs cannot recover on account of the loss or injury to any goods acquired by them subsequent to the dissolution of the firm of H., P. & Co. (Wood *a.* Rutland Ins. Co., 31 *Vermont*, 552, 563.)

The business of Hoffman & Place was a new one. They were new parties, and to make these defendants liable for their loss, it must be shown that they have contracted with them. The new firm purchased $8,023.78 in new goods before the fire.

IV. The judge erred in not charging that the plaintiffs having stated the costs of the goods in the preliminary proofs of loss, are bound thereby, and cannot now claim that they cost any greater or higher amount. (Irving *a.* The Excelsior Fire Ins. Co., 1 *Bosw.*, 507, 514.)

V. The judge erred in amending the 8th request to charge, by adding thereto the words, "except such as, from their total destruction, they could not specify with more particularity than they have done."

There was no pretence that the plaintiffs could not describe or designate all the goods. Their books, papers, bills, and all their accounts were saved, and from them they could have made up, and did make up, their proofs of loss. The exception tended to lead the jury to suppose that other goods than those set forth in the proofs of loss might have been destroyed, and for which they were at liberty to make an allowance.

VI. The judge erred in refusing to charge the jury as ninthly requested.

1. On the 24th April, the plaintiffs furnished the defendants with a sworn statement of the property injured by the fire; in this statement they stated the total, just, and true cost of the goods.

2. By the terms of the policy, the cash value was the cost to replace them. The cost was fixed in the proofs by the plaintiffs, and they swear this cost was just and true, and we submit they should be bound by it, and the court should have so instructed the jury. Then after deducting the actual value of the goods in their damaged condition, the balance would have been the actual loss.

VII. The judge erred in refusing to charge that the price for which such goods were generally sold by or purchased from wholesale dealers and manufacturers, could not be taken as the basis from which the cost to replace the goods could be calculated.

1. These plaintiffs were wholesale dealers in, and manufacturers of, furnishing goods. In the proofs of loss, the first column of the statement showed the cost, and the other the selling price or cash value, as the plaintiffs termed it. The cash value was the plaintiffs' selling price, as they claimed.

2. Now we insist that the words, "cost to replace the goods," as used in the policy, does not mean what it would cost wholesale manufacturers and dealers to replace the goods by purchase at retail, nor what it would cost wholesale dealers to replace the goods by purchases from wholesale dealers. The cost to replace them means, in this case, the cost of reproduction or importation. The injustice of the rule that the cost to replace the goods, means what it would have cost the plaintiffs to have gone into the market and purchased similar goods from similar wholesale dealers, is too apparent for argument.

3. Should this construction prevail, and had the plaintiffs' entire stock been destroyed, they would recover not only the cost of the goods, but 30 per cent. profit upon the whole amount, without a credit of four months, or any losses from bad debts.

4. The judge not only refused to charge as requested under this point, but actually charged (under the defendant's exception), "that the jury should take what it would have cost the plaintiffs, at that time, to have gone into the market and purchased the same kinds and quantities of goods they had lost, as the basis upon which they should calculate the amount of the damage sustained."

The judge says, the basis should be what it would cost to go into the market and purchase. The contract says, it shall be what it would cost to replace them. Replace by whom? Certainly by the plaintiffs. How? Clearly as they were placed before—by manufacture and importation—in the ordinary way in which the plaintiffs created and provided their stock for sale. Certainly the word replace, in this connection, can mean nothing else. It is absurd to suppose it means the purchase in

the market at a profit of 30 per cent. on the manufacturer's price, when it was the plaintiffs' business to do that very thing.

We submit that this part of the charge was clearly erroneous.

VIII. The judge erred in refusing to charge that the proofs of loss in reference to the sum of $1,307.66, are insufficient; and as to that sum the plaintiffs were entitled to recover.

1. It will be observed that no portion of the books, inventories, bills, or memoranda of the plaintiffs was injured or destroyed by the fire. They could tell what goods they had in the store the night of the fire.

2. The 9th condition requires that, as soon as possible after the fire, the insured shall deliver as particular an account of the loss and damage as the nature of the case will admit.

3. Now, we submit, that the plaintiffs having all their books, inventories, and bills, were as able to give a detailed account of the particular goods making up the $1,307.66, as they did in making up the other amounts. After having given a detailed inventory from the books, of all the goods they had on hand on the night of the fire, they insert in a lump $1,307.66 for goods lost. Now they could not know they were lost except by the books; and if they appeared on the books, then they could have given the particulars of them, as they did of the other goods entered there.

We submit that the proofs, in relation to this round sum of $1,307.66, is not a compliance with the terms of the policy, and the amount should have been rejected; and that the defendant's exception to the charge of the judge upon this point was well taken.

IX. The judge erred in refusing to charge as twelfthly requested.

X. The judge erred in amending the 13th request.

1. The cash value was not, as ordinarily understood, the measure of the loss. The true measure was what it would cost to replace the property.

2. The amendment by the judge was an indication to the jury to allow for loss of trade and profits, provided they did not in the total amount exceed the cash value of the property at the time.

This was error, and tended to mislead the jury.

XI. The judge erred in charging the jury substantially that the relaundrying of the shirts was a matter not to be taken into consideration by them.

The principal portion of the stock was shirts, bosoms, and collars, from two-thirds to three-fourths in amount.

It was proved that these goods could have been relaundried at a small expense, and when so done would have been just as good as when new. Now we insist these facts should have been taken into consideration by the jury in determining what it would cost to replace them.

The charge on this point we submit, with deference, was clearly erroneous.

XII. The judge erred in instructing the jury that they should take his figures as stated by him, as the basis of their calculation, if they concluded to find a percentage of damage.

B. Sandford, for the plaintiffs, respondents.

By the Court.*—Robertson, J.—The policy in this case declares the subject insured by it to be merchandise contained in a certain building, either "Hoffman, Place & Co's," or held by them in trust or on commission, even if sold, provided it was not delivered. The defendants also by it agree to make good, not only to the insured (H., P. & Co.), but also to their executors, administrators, and assigns, any loss by fire to the property insured for a year. Another clause in the policy declares it to be null and void, if the property insured is sold or conveyed. This conflicts with the description of the subject of insurance, which permits the property to be sold, if not delivered. If they are to be reconciled by supposing the description to create an exception to the annulling clause, the difficulty remains of the kind of sale intended. It would be superfluous to provide for a sale to customers, because the assured would have no insurable interest. The annulling clause, which is printed, seems to have been intended for subjects of insurance existing when the policy was executed, and not for a suspended policy like the one before us, which had no vitality, until some merchandise was brought into the building in question, to

* Present, Robertson, White, and Barbour, JJ.

which it could attach. (Hooper *a.* Hudson River Fire Ins. Co., 17 *N. Y.*, 424; Dey *a.* Poughkeepsie Insur. Co., 23 *Barb.*, 623.) And yet, what is required to be sold, is not the interest of any of the assured, but the property itself. The loss to be paid for is not damage to such interest, but to the "property" itself; and the parties, whose loss is to be made good, are not merely the assured, but their representatives if they die, or their assigns if they live. These provisions certainly look to a sale of the goods out and out, particularly in connection with the permission to sell without delivering, and not to a mere change of interest among the parties. The clause itself, which renders the policy null and void, is so wholly inappropriate as applied to a shifting policy, on a fluctuating stock of goods, that it could be entirely rejected, without great violence, as inoperative.

But whatever the meaning of the term "sold" may be, the annulling clause must be strictly construed. (Livingston *a.* Stickles, 7 *Hill*, 253; S. C., 8 *Paige*, 398; Jackson *a.* Harrison, 17 *Johns.*, 66.) Under a similar one, both an executory contract of sale and a mortgage, have been held not to be a sale. (Masters *a.* Madison Co. Mut. Ins. Co., 11 *Barb.*, 624; Conover *a.* Mut. Ins. Co., 1 *N. Y.*, 290.) There would be no entire sale, even of the interest of any joint assured, while he retained the slightest interest in the property. And the only purpose of prohibiting a sale by any of the parties would be to compel each one to retain some interest. It is difficult to perceive what benefit that would bestow on the insurer, unless it were accompanied by a positive obligation, by each of the assured, to be actively employed in taking care of the property. Otherwise it would only increase the number of persons having an interest to commit a fraud. It is supposed by the author of a note in the second volume of Parsons on Maritime Law (p. 46), that the fatal effect of a release by one partner to others of his interest in goods insured in a policy, having such a clause in it, is owing to the loss by the underwriter of the character, exertions, and vigilance of every assured to prevent a fraud. But unless there is something in the policy entitling the insurer to the positive efforts of each assured to prevent fraud, I do not see how the possibility of a contracting party being so honest and vigilant as to prevent fraud by his co-contractors,

aids the underwriters. All policies are framed on the theory of there being temptations to commit fraud, and with a view to guard against it by positive stipulations and conditions. Otherwise the fact of making a contract at all with several persons constituting the assured, assumes that they are all fit to be trusted. The possibility of fraud, arising from the increase of the number of persons to be tempted, is practically greater than the probability of the discovery and prevention of the fraud by the possible conscience and vigilance of the added parties, against their own interest. The substitution of a new party, by assignment, without the consent of the underwriters, but not the withdrawal of one of the original assured, may increase the risk. In every case, where the effect of a clause in a policy prohibiting alienation of the subject of insurance has been discussed, its purpose has been considered to be the same as that prohibiting underletting, or assignment in a lease; which was, that the person who could avail himself of such a provision, may know with whom he is dealing, and not be made to contract with a stranger. This reason can only prevail when a new party intervenes, and never when one of the former contracting parties merely releases his interest to his co-contractors.

The foregoing views are applicable to every case of an insurance of several persons; but in the present one, the assured were partners, and insured as forming a partnership. They were, therefore, entitled to exercise all the rights of partners, and were to be subject to all their responsibilities. One of the consequences of a partnership is, that the interest of any partner may be virtually transferred by operation of law to the others, by his taking more than his share of the partnership profits to his own use; or, by his insolvency, may go to his creditors, or, by his death, to his representatives. The representatives of any who die become joint owners with the survivors. The annulling clause in question could never have been intended to reach such a change of interest; and if not such, why should it be supposed to have been intended for any release by either partner to any of the others? It should require the most explicit expression of such an intention, before it could be assumed that the assured intended to lose all benefit of the policy after having paid the premium, in case any of

them relinquished his interest to his associates. (Wilson *a.* Genesee Mut. Ins. Co., 16 *Barb.*, 511.)

The question of the effect of the release by one of the assured to his co-assured of his interest in the subject insured, where a policy contains a provision avoiding it in case of a sale of such subject, has not yet been definitively settled in the court of *dernier resort* in this State. But the reversal by it of the judgment of the Supreme Court in the two cases of Tillou *a.* Kingston Mut. Ins. Co. (7 *Barb.*, 70; S. C., 5 *N. Y.*, 406) and Wilson *a.* Genesee Mut. Ins. Co. (16 *Barb.*, 511; S. C., 14 *N. Y.*, 418), where that question had been raised, and passed upon in the court below, without disposing of it, is strong evidence of the leaning of that court. There was not even a word of disapprobation of the doctrine of the court below in regard to it. Moreover, in the two cases of Howard *a.* Albany Insurance Co. (3 *Den.*, 301) and Murdock *a.* Chenango Insur. Co. (2 *N. Y.*, 210), cited as authority for the contrary, in which the question in fact arose, the respective courts, before whom they were, placed their decision upon the ground merely of the improper joinder, as plaintiff, of the party who had released his interest to the others. Yet, strange to say, these separate cases decided in Illinois, Missouri, and Pennsylvania, respectively, by some misapprehension, have held that such a release made a policy, containing such a clause, void, upon the authority of the two cases last cited. (Dix and Others *a.* The Mercantile Ins. Co., 22 *Ills.*, 277, 278; Dreher *a.* Ætna Ins. Co., 18 *Miss.*, 135, 136; Finlay *a.* Lycoming Mut. Ins. Co., 30 *Penn.*, 311–313.)

No reason derived from authority warrants any departure, therefore, from the doctrine as laid down in Tillou *a.* Kingston Mut. Ins. Co. and Wilson *a.* Genesee Mut. Ins. Co., in the Supreme Court, strengthened as they are by the subsequent approbation of that doctrine in the cases of Dey *a.* Poughkeepsie Mut. Ins. Co. (23 *Barb.*, 623), in the Supreme Court, and Buffalo Steam Engine Works *a.* Sun Mut. Ins. Co. (17 *N. Y.*, 412), in the Court of Appeals.

The refusal, therefore, of the judge at the trial of this cause, to charge that the release of one partner to one of the plaintiffs avoided the policy as to all, was therefore correct.

The next question that arises is, whether the plaintiffs can

recover for the interest in the merchandise assigned to one of them by his copartner; in other words, for the whole of the damage to the property. This is equally involved in the damage to the merchandise bought by them after his retiring from the firm, and must turn, not upon the question of a sale by him, but of the acquisition by them of his interest and his losing it. As the policy is a contract of indemnity, and the plaintiffs are injured to the extent of the whole damage to the property insured, if they can maintain an action in their own names alone, there would seem to be no reason why they should not recover the whole of their loss. The cases last referred to, which pass upon the effect of a release by a joint owner to his co-owners, in case of a similar clause, put the deprivation of the party who has parted with his interest, of all right to join as plaintiff, upon the ground that he has parted with his interest. This recognizes a fire-policy as being a contract with the assured named in it, only so long as they have an insurable interest, and with such of them as retain such an interest, after the others have parted with theirs. If the assured having an insurable interest are entitled to join in an action, and are entitled to recover at all, I see no reason why they should not recover the damage to the whole property, from whomsoever they derived it. If new merchandise bought by them could be covered by the policy, certainly, although the plaintiffs acquired the title to what they had on hand by two purchases, the latter must be equally protected.

Besides this, the policy expressly provides that the defendants shall pay any loss "to *the property* insured," and not merely to the interest of the plaintiffs therein. Any limitation of the recovery of parties insured, to the extent of their interest, is derived from general principles of law alone. That interest in this case was equivalent to the entire ownership of the goods. The policy also provides for any loss to the successor and *assigns* of the assured, as well as to the latter themselves. On all of these grounds, therefore, the refusal of the judge on the trial to direct the jury to disregard the interest assigned by the retiring partner, and not to allow for goods bought after he retired, was correct.

I am unable to perceive any connection between the proof of the cost of manufacturing articles similar to those injured

by the fire in question, and the actual cost of those articles as stated in the inventory. Although the latter is required, by the ninth condition attached to the policy, to be stated in the preliminary proofs, the same condition provides that the amount of *sound value* shall be ascertained by appraisers, and that such sound or *cash value* of the property destroyed or damaged by fire shall be what it may cost at the time of the fire to replace it. No evidence was offered of a different actual cost than that stated in the inventory in the preliminary proofs. If it had been, I am not prepared to say that the case of Irving *a.* Excelsior Fire Ins. Co. (1 *Bosw.*, 507) would have excluded the correction of mistakes. (Am. Ins. Co. *a.* Griswold, 14 *Wend.*, 399.) The defendants were not bound by the policy to pay the actual cost, nor were the plaintiffs limited to it; although when furnished it afforded some criterion as to the value of the articles at the time of the loss. Indeed the plaintiffs furnished the cash value as well as the cost in their inventory. The request to charge that the plaintiffs could not claim that the merchandise cost any more than they stated it to have cost in their preliminary proofs, was therefore ambiguous in not defining what kind of costs was meant. If it meant the cost of similar articles in the market, it was probably refused because not warranted by law; and if it meant actual cost of these identical articles, there was no aliment for the instruction in the evidence.

The learned judge before whom the cause was tried was correct in qualifying his instruction that the plaintiffs could only recover for the goods set forth in their schedule, with the exception, that those might be recovered for the total destruction of which prevented more particularity in specifying them, accompanied as it was by a reference to the destruction of books and papers in his charge. (Norton *a.* Rensselaer and Saratoga Ins. Co., 7 *Comst.*, 645; McLaughlin *a.* Wash. County Mut. Ins. Co., 23 *Wend.*, 525; Bumstead *a.* Dividend Mut. Ins. Co., 12 *N. Y.*, 81.) The policy itself, in its ninth condition, required only as much particularity as the nature of the case would admit of. The original actual cost of the goods not being the standard of value agreed upon by the parties, it would have been error to have charged, as requested, that the loss of the plaintiffs was to be ascertained by deducting the value of the goods in their damaged state from their original cost; and the

refusal so to charge was proper. The price for which wholesale dealers and manufacturers sold similar goods was one mode of aiding in arriving at their market value, and instructing the jury to the contrary would have been erroneous; the direction actually given in that respect was proper. So far as any loss in the business of the plaintiffs, or of profits in the course of their business, was embraced in the difference between the cash value of the articles damaged and their actual cost, the plaintiffs were entitled to recover, because the measure of their indemnity was present cash value, not original cost; and by whatever name the difference may be called, the plaintiffs are entitled to it. To have instructed the jury, as requested, that they were not, would have been erroneous, and was properly withheld. The plaintiffs, of course, were entitled to interest on the amount of their claim from June, 1862, being thirty days from the day of presenting the claim, at which time, by the terms of the policy, it was payable. (Vandenheuvel *a.* United Ins. Co., 1 *Johns.*, 406; Van Rensselaer *a.* Jewett, 2 *N. Y.*, 141; Livingston *a.* Miller, 11 *N. Y.*, 80.)

The clause in the policy respecting the duty of the assured in regard to the protection of the property insured was properly interpreted by the learned judge in his charge. They were not bound to use any means or incur any expense to restore the merchandise injured to its previous condition; they were only bound to take the necessary steps to prevent deterioration, and place it in a condition to be examined. If the attempted use of such means should result in a deterioration of the article, the defendants would not be liable for that injury. The jury had a right to take into consideration the feasibility of the use of such means in restoring the goods, and its expense, in fixing the market value. But the defendants, in the absence of any stipulation to that effect, had no right to impose on the plaintiffs the burden, risk, and delay of relaundrying the damaged articles for their benefit. The exception to the charge in that respect was not well taken, besides being to a whole paragraph, some parts of which at least were correct beyond all question.

An exception was taken on the trial to a part of the charge to the jury, consisting of a statement of figures, upon the basis of which they were instructed to proceed to estimate the dam-

age done to the goods in case they took a percentage of injury as the mode of arriving at it. This statement consists in a great measure of facts. Some of the propositions contained in it are unquestionable. No objection was made to it upon the ground that the facts were misstated; and no particular instruction contained in it as regards the law was singled out as an object of exception. The exception taken should fail upon that ground. The jury were in such statement substantially directed to take the market value of the injured goods and the value of those entirely destroyed as the basis of their calculation of damage. The market value, as placed upon them in the preliminary proofs of loss, was stated not to be contested; and the residue of that value, after deducting the value of goods uninjured, was required to be part of such basis; and the jury were directed to take a certain other sum as the value of goods entirely destroyed, for the other part of such basis. That sum was stated to be arrived at by taking the value on an inventory made at the time of the retiring of one of the partners, and adding to it purchases to the time of the fire, deducting from such sum the amount of subsequent sales and goods subsequently discovered, which the learned judge stated would leave such value as that of the destroyed goods. Of course, he did not add that from such difference was to be deducted the value of the remaining goods, it being plain that such was his meaning. It is true the calculation would make a larger amount destroyed than was stated by the learned judge, but that is no cause of exception by the defendants. There was, it is true, evidence adduced of other injured goods belonging to the plaintiffs in the building in question, besides those contained in their first schedule of loss, whose value was given at cost prices; but there was no request to the judge to instruct the jury that they were to be taken into consideration in estimating the goods totally destroyed. It does not clearly appear what kind of estimate was put on the stock on hand when one partner retired and assigned to the others. The jury certainly had a right to determine from the value of the goods at that time, subsequent sales and purchases, and the value of the goods on hand after the fire, if uninjured, if such values were estimated by the same standard, whether the difference was caused by an actual destruction of property by the fire or any other cause;

and if by an actual destruction, the extent of it. If there was no dispute about such values, and no evidence to account for the existence of such difference, it was a mere matter of calculation. If the learned judge assumed as the foundation of his instruction that there was no such dispute erroneously, that error should have been corrected, not by an exception, but by calling his attention to it to have the correction made. And if he overlooked the supplementary statement in the preliminary proofs as an element in determining the actual destruction of property and its value, his attention should have been called to such omission. The value of the property uninjured, in making such calculation, was immaterial, as it ought not to be deducted at all from the sound value of the remaining goods in ascertaining the complete destruction of property, since it still remained in existence. The value of the destroyed property does not seem to have been questioned at all throughout the trial, and was sustained by evidence; and if any error was made in that respect, it is not to be questioned for the first time now on exceptions. Moreover, there was no direction given to the jury to allow that amount of damage, but merely that they were to take it as part of the basis of their calculation in finding a percentage of damage, along with the value of the goods remaining in existence, which they had a right to do. The loss, with interest, appears from the verdict of the jury to have been estimated by them at about $8,150, or, with the interest for eight months deducted, about $7,800. The estimated cash or present market value of all the injured goods, if sound, was nearly $17,700; deducting $1,300 as the value of the destroyed goods, from the estimate of damage by the jury, leaves $6,500 as their estimate of damage to the injured articles, being less than 40 per cent., and less than the average between 10 and 75 per cent., the extreme rates furnished in the testimony given on the trial. Including the entirely destroyed property, the estimated rate of damage would be about 46 per cent. Unless the jury were bound to take the cost of the articles instead of their cash or market value as the basis of computation, no great injury was done to the plaintiffs by the direction to assume the value of property destroyed as that testified to and apparently undisputed on the trial.

Several exceptions were taken in the course of the trial to

the admission of testimony, and its exclusion. Most of such exceptions involved the same principles as those previously discussed; and the far larger part related to evidence of an advance of the goods in value after they were purchased by the plaintiffs up to the time of the fire. One was to an instruction by the learned judge in his charge, that the plaintiffs were entitled to recover for damage to the subject of insurance by water used to extinguish the fire, which, of course, was untenable. One of the witnesses was asked to state what was the whole cost value of the stock found after the fire, and was informed he could refresh his recollection by reference to a book, which was objected to. Whether this objection was made to his stating the cost value, or looking at the book, does not appear, nor whether he looked at the book at all. The question as to the statement was undoubtedly proper, as the witness had shown a knowledge of the subject, and was properly admitted: the objection was therefore properly overruled. On another occasion an inventory of goods, of which the cost prices were taken from the plaintiffs' bills and books of account was stock received under objection and exception. This had been admitted by the defendants to contain a correct statement of the stock of the plaintiffs, and the calculations of amounts in it were proved to be correct. No objection was taken to it specifically, that it was a mode of leading the witness, or that it was mere secondary evidence, the original bills and books not being accounted for. If the objection had stated those grounds, the defect might have been cured on the trial, and the objection taken was properly therefore overruled. A schedule marked "defendant's answer," of whose nature and contents there was no evidence, was also properly excluded. Another witness (Cleveland) testified to an appraisal of loss made in an inventory after examining the goods, and the total amount thereof was given by him; it consisted of nearly seven hundred items, and he was asked by the party calling him to read from it the names of every article, and the percentage of damage upon it "*seriatim*," which was prevented by the court. As the only result of such a course would have been an unnecessary waste of time, had the threat been carried out, it was properly cut short; whether it could have been taken on a cross-examination under some possible condition of things, is

a different question. In like manner, an inventory testified to by another witness (Hyatt) as made by him, was properly excluded; as he was able to, and did testify to the estimate made by him, of the loss, without it. Some questions were properly excluded as leading, and others as irrelevant, not necessary to be passed upon separately.

The labor of examining in this case the questions now presented, by judges unfamiliar with the evidence on the trial, has been much increased by the unnecessary voluminousness of the case, caused by inserting questions withdrawn, answers excluded without objection, exceptions by the plaintiffs' counsel, a great deal of testimony not necessary to raise the questions on the exceptions, contrary to general rule 36; and the whole testimony in the form of question and answer, notwithstanding all the questions were not objected to. The labor of reducing the case to its proper proportions is thus thrown on the whole court at the hearing, when it should have been done on the settlement of the case. It would seem that the present case never had been submitted for settlement. The 36th rule just referred to seems to imply that this should be done in all cases. The growing evil of improperly prepared cases may call upon the court to refuse to hear causes where they are offered, and treat them as if no case had been made. The same inattention has been noticed before in other cases, but without apparently any good effect.

The exceptions having been rightly disposed of on the trial, and there appearing no error in the charge of the court, or refusal to charge as requested, the judgment appealed from must be affirmed, with costs.

Barbour, J. (dissenting.)—It is an elementary principle, that a policy of insurance is a personal contract, whereby the insurer engages to indemnify the assured for such loss as he may sustain by reason of the perils insured against, and that such contract is not assignable, before loss, without the consent of the obligor. (1 *Arn. on Ins.*, §§ 1, 8, 9, 13; Skinner *a.* Somes, 14 *Mass. R.*, 107; Jessel *a.* Williamsburgh Ins. Co., 3 *Hill*, 88; Wood *a.* Rutland & Add. M. F. Ins. Co., 31 *Vt. R.*, 552.) Besides, there is no pretence in this case that any assignment or transfer was ever attempted to be made by Silvernail of his

interest in the policy, to his partners, or either of them; so that it is quite clear, that the plaintiffs are not entitled to recover, by virtue of any assignment of the policy, as representatives of the interest therein of the copartnership firm insured, and of which they constituted but two of the three members. If they can succeed at all, it must be upon the ground that the contract of indemnity enured to their individual benefit as members of the firm, and that it covered all the property of which they, as copartners in another firm, were the owners, when the loss occurred.

But in the case before us, the insurance, it appears to me, was intended to be made with all the copartners jointly, and covered their joint interest as such in the property of the firm; and nothing was designed to be included in the contract except such of the property, described therein, as should continue to belong to them all, as copartners, at the time a loss should occur. The insurers took just this risk, and no other, and the assured accepted the policy with that understanding; and, each and all of them must be held to have assumed, with such acceptance, the legal obligation always incumbent upon parties procuring an insurance upon their property, that each of them would exercise reasonable and proper watchful care and prudence, for the protection of the property insured, and intended to remain in their hands. In the event which has occurred in this case, therefore, I think the defendants may well say, in answer to the plaintiff's claim, "Confiding in the habits, good sense, and prudence of Silvernail, and believing that the safety of the goods would be cared for by him, we executed the policy, when, without that, we would not have taken the risk; and we had, therefore, a legal right to expect a continuance of such care and prudence on his part: our contract was made with him and his two partners, jointly, and not with either two of them without the other; and we agreed to indemnify them for such of the goods, described in the policy, only, as should belong to the firm of Hoffman, Place & Co., at the time a loss should occur."

The authorities upon this point are not only numerous, but, in this State, somewhat conflicting. The first in time, of those I shall consider, is Howard & Ryckman *a.* The Albany Ins. Co. (3 *Den.*, 301), which was an action, brought in the name

of both of the parties insured, to recover for a loss alleged in the declaration to have been sustained upon a fire-policy issued to them by the defendants. The defendants plead, that, after the insurance, and before the loss, the plaintiff Ryckman sold and transferred all his interest in the property covered by the policy to Howard, to which the plaintiffs demurred specially. The question thus brought directly before the court was precisely like this, except that, in the former case, the policy contained no restriction whatever, in terms, upon the sale of the subject insured (a matter, by the way, which I will hereafter consider). A majority of the court, Justices BEARDSLEY and JEWETT, sustained the plea demurred to, upon the ground that the plaintiff, for whose benefit the action was brought, could not recover for any portion of the loss, inasmuch as the persons insured had no joint interest in the property at the time such loss occurred; and judgment was ordered for the defendants. Justice BRONSON, however, dissented, holding that the contract of insurance was not terminated when the plaintiffs ceased, by a sale from one to the other, to have a joint interest. "The case," he says, "is not free from difficulty; but I think there may be a recovery on account of the interest which Howard had in the property at the time the contract was made, because that interest continued until the loss happened. But there can be no recovery on account of the interest which Ryckman had in the property at the time the contract was made, because he had parted with that interest before the loss."

Murdock & Garrett *a.* The Chenango Mutual Ins. Co. (2 *Comst.*, 210) was an action upon a policy issued to the plaintiffs as owners of a mill. After the insurance, but before the loss, Garrett conveyed his interest in the premises to Murdock. Upon the trial, the defendants moved for a nonsuit, upon the ground, among others, that the joinder of Garrett in the action was fatal to a recovery; which motion was denied, and the plaintiffs had judgment. Upon appeal to the court of last resort, the judgment was reversed, and a new trial ordered. Judge CADY, in delivering the leading opinion in that case, remarked: "The question is, whether an action can be sustained in the names of both, when one has no legal interest in the suit. The joint interest in the property insured was destroyed when one conveyed all his interest to the other. That act, in which

both concurred, rendered it impossible that a loss could afterwards happen within the meaning of the policy; the joint property of the insured could not thereafter be destroyed by fire, because they had no such property." . . . "If one of two owners of a mill, who are jointly insured, sells his part to a stranger, it may appear like a hardship that such sale should destroy the policy; but it is no more than happens in all cases where there are joint promisees, &c., and one of them discharges the promise." . . . "In this case, both the promisees concurred in the act which destroyed the joint remedy on the contract." This decision was subsequently discussed, and its principle reaffirmed by the Court of Appeals in Tillou *a.* The Kingston Mutual Ins. Co. (5 *N. Y.* (1 *Seld.*), 405), where it was held that the former case, and Howard *a.* Albany Ins. Co. (*supra*), were conclusive upon the subject; thus reversing the decision of the general term in the second district, where Judge Barculo had expressed a contrary opinion.

These cases in our highest appellate court authoritatively overrule the evidently hasty decision of the Supreme Court, first district, in Wilson *a.* Gen. Mutual Fire Ins. Co. (16 *Barb.*, 512); and they have been followed by the Supreme Court of Vermont in Wood *a.* The Rutland & Addison Mutual Fire Ins. Co. (31 *Vt.*, 552); a case which, so far as the naked question now under consideration is concerned, seems to be precisely like this. There, a policy upon merchandise in trade was issued to Wood & Co., a firm composed of Wood & Johnson. Afterwards, Johnson having died, Wood purchased the interest belonging to his estate, and continued the business of buying and selling merchandise on his own account, up to the time of the loss. The court, in an action brought by Wood upon the policy, held that if the plaintiff had continued in the care and possession of the goods as surviving partner only, an action might have been sustained by him as such survivor; but that, as his claim rested upon his purchase of the interest of his deceased partner, and the continuance of the business for his own benefit, he could not recover. In speaking of the effect of a sale by one of the assured partners to the others, and in approval of the decisions in Murdock *a.* The Chenango Ins. Co., the court says: "This has sometimes been put upon the ground that, at the time of the loss, the old firm had no insurable in-

terest in the property. But, we think, where there is a voluntary change of the firm, the insurance company may, also, well say that the new firm is not the party with whom they contracted." . . . "They might be willing to insure Wood while connected in business with Johnson, and wholly unwilling to insure or deal with him alone."

Upon these authorities, and for the reasons I have suggested, I have no hesitation in holding that, independent of the clause in the policy prohibiting the sale of the insured property, and solely upon the principle that the risk only extends to such of the property as continues to belong to all of the assured at the time of the loss, and that such assured, and they alone, can sustain an action upon the policy, the plaintiffs in this case cannot recover, and that the refusal to charge as requested in this regard was erroneous.

If such must be the result in cases where no provision is contained in the policy, in terms restricting the power of sale by the assured, *a fortiori*, it seems to me we must arrive at the same conclusion where such prohibition is inserted and directly expressed in the contract itself, with the assent of the parties insured, as in this instance; and so we find it has been decided in sundry cases in the highest courts of our sister States.

In Dix *a.* Mercantile Ins. Co. (22 *Ills.*, 272), an insurance was effected by a firm composed of three partners, upon its stock of merchandise. The policy contained a condition that the instrument should be void in case of a transfer or change of title of the property insured, or of an assignment of the policy. One of the partners sold his interest in the goods to the other two, previous to the loss. The Supreme Court of Illinois held that such sale avoided the policy and terminated the liability of the insurers. Judge Breese, in delivering the opinion of the court, uses this language: "A contract, as well of insurance as in regard to any other matter, must be interpreted according to the intention of the parties making it; and that is to be gathered from the language employed and the objects contemplated by it. The intention of the company was manifestly that no strangers should come into the care and management of this property without their consent. Knowing the parties with whom they contracted, and relying upon the fidelity and circumspection of each and every one of them, they

were willing to take the risk at the premium stipulated." . . "They were willing, for the premium, to intrust the property to the care and guardianship of Sinclair, Dix, and Harris, but not to the care and watchfulness of Dix and Harris alone. Is it not clear that the assurers may be as greatly prejudiced by removing one to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been the very one on whose vigilance, fidelity, and care the greatest share of confidence was reposed; and by so removing, the hazard is increased to the insurer, without any corresponding increase of premium."

Finlay & Stanley *a.* The Lycoming County Mut. Ins. Co. (30 *Penn.*, 311) was an action upon a policy issued to a firm of two partners, containing a similar provision, and where one of the partners had sold his interest in the insured property to the other, before the loss. The Supreme Court of Pennsylvania held that the plaintiffs could not recover. Justice THOMPSON, in pronouncing the decision, after stating that it was a fundamental condition of the contract that alienation of the property should render the policy void, added: "It cannot be doubted that a sale by one partner to another is within the prohibition." . . "By the transaction, the one parted with all his interest, and the other acquired double what he previously possessed."

A like conclusion was arrived at by the Supreme Court of Missouri in a case of the same character. (Dreher & Bumb *a.* Ætna Ins. Co., 18 *Missouri*, 128.)

These decisions of the ultimate appellate courts of Pennsylvania, Illinois, and Missouri, it is unnecessary to say, are entitled to the highest respect as authorities; and I have been unable to find in the books any opinion of a contrary tenor upon this particular point. Without examining the further exceptions contained in the case, I am, therefore, in favor of reversing the judgment, and directing a new trial.

Judgment affirmed.

HAZLETT *a.* GILL.

New York Superior Court; Special Term, October, 1865.

ARREST.—MOTION TO VACATE.

Under subdivision 4 of section 179 of the Code of Procedure (as amended in 1863), the defendant in an action to recover damages for false and fraudulent representations respecting the pecuniary responsibility of third persons, is liable to arrest upon proof of the cause of action, merely, without proof of his non-residence or intent to depart.

Motion to vacate order of arrest.

This action was brought by James Hazlett and another against James Gill, to recover damages for an alleged false and fraudulent representation, made by the defendant, respecting the pecuniary responsibility of the firm of Gill & Co. The defendant was not a member of the firm.

Upon affidavits alleging the making of the false representations, and that the defendant was about to leave the State, an order of arrest was granted by one of the justices of this court, and the defendant was arrested and held to bail.

A motion was made to vacate the order of arrest on affidavits denying that the defendant was about, or had any intention to leave the State, or to put himself beyond the reach of the process of the court.

A. R. Dyett, for the motion.

James M. Smith, opposed.

MONELL, J.—The sole ground relied upon in support of this motion is, that the alleged design of the defendant, to depart from the State, is sufficiently negatived by the moving affidavits. There is no denial of the fraud complained of, but merely a denial of any intention to leave the State.

The defendant's counsel supposed that the order of arrest

had been granted under the first subdivision of section 179 of the Code.

Under that subdivision, in actions for the recovery of damages, on a cause of action not arising out of contract, it must appear that the defendant is not a resident of the State, or is about to depart therefrom.

In a case similar to this, decided in this court in 1859 (Smith *a.* Corbierre, 3 *Bosw.*, 634), it was held that the order could not be granted unless one or other of these facts appeared. When that case was decided, a defendant could not be arrested for a fraud, except under the first subdivision of the 179th section; and then only upon proof of the non-residence or intended departure of the defendant from the State.

The Legislature in 1863 amended the 179th section, by adding to the 4th subdivision the words: "Or, when the action is brought to recover damages for fraud or deceit."

This amendment virtually repealed that part of the first subdivision relating to causes of action not arising out of contract, and designates a class of actions wherein a defendant may be arrested irrespective of his residence, or of an intention to leave the State.

In this case, the fraud complained of is the very gist of the action. The plaintiffs cannot recover, except upon establishing the falsity of the representations alleged to have been made; and the recovery must be damages for the fraud.

The plaintiff's action, therefore, is one of those designated in the amendment; for a false representation concerning the credit of another, by which a person is induced to part with his property, is a gross fraud and deceit.

It is now no longer necessary, in this class of actions, to aver that the defendant is a non-resident, or is about to depart from the State. Upon proof merely of the fraud, the defendant may be arrested in the action.

The motion must be denied, with $10 costs to abide the event; with leave, however, to renew the motion on affidavits disproving the fraud.

LEE *a.* WILKES.

Supreme Court, First District; General Term, May, 1865.

NON-JOINDER OF PARTIES.—PLEADING.—VARIANCE.

The objection that one who was jointly liable with the defendant, is not joined with him as a party in the action, is not available to defeat the action, unless it is set up by pleading. An objection to it at the trial, as a variance, cannot prevail.

Appeal from a judgment on a verdict.

The plaintiff sued the defendant, one of the proprietors of a newspaper, for compensation for services as a reporter or otherwise. At the trial, before Mr. Justice LEONARD, the defendant's counsel moved for a nonsuit, on the ground that the plaintiff had not joined the other owners. This the court overruled, on the ground that no such defence had been set up in the defendant's answer.

The jury rendered a verdict for the plaintiff, and the defendant appealed to the general term.

John K. Hackett, for the appellant.

D. & T. McMahon, for the respondent.

BY THE COURT.*—CLERKE, J.—This case is too clear for argument. Previous to the adoption of the Code of Procedure, the non-joinder of a co-promisor could be taken advantage of only by a plea in abatement. Such pleas being abolished by the Code, the 144th section provides that when any of the defences enumerated in that section exist, among which is a defect of parties, the defendant may demur when the defect shall appear on the face of the complaint.

Section 147 provides, that when any of these defects do not

* Present, LEONARD, P. J., CLERKE and SUTHERLAND, JJ.

appear on the face of the complaint, the objection may be taken by answer.

And section 148 provides, that when no such objection shall be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

It is no answer to this to say, that the proof shows a joint liability of the defendant; this may be a variance, but it constitutes the very objection the defendant shall be deemed to have waived.

Judgment should be affirmed, with costs.

MATTISON *a.* DEMAREST.

New York Superior Court; General Term, December, 1863.

DISCONTINUANCE OF CREDITOR'S SUIT.—RIGHTS OF CREDITORS COMING IN.

Where a creditor's suit is brought by plaintiffs suing not only on behalf of themselves, but also on behalf of all other creditors of the same debtor who are similarly situated and shall contribute, &c., such other creditors acquire no vested rights until judgment. The plaintiffs instituting the suit, and the defendants, must be left until judgment to prosecute and defend without regard to the claims of such other creditors;* and the court will not grant an order

* It was held in an ANONYMOUS CASE (16 *Ante*, 87), that where, in such an action, after the usual notice for that purpose, other creditors have appeared before the referee, upon the accounting, and proved their debts, and excepted to the referee's report,—such other creditors (whether they are deemed to be actually parties or not, without an order of court declaring them such) are entitled to notice of an application for judgment upon the report of the referee; and if the attorney for the original plaintiff enters judgment upon an order obtained on the consent of the defendant, and without notice to the objecting creditors, and without any opportunity to them to be heard on their exceptions, the court will, on motion, set aside the judgment.

It was held in the case of BURR *a.* BIGLER (14 *Ante*, 177), that the term "par-

that the action be deemed prosecuted for their benefit from the commencement, so as to preclude the defendants from claiming a discontinuance by paying the judgment of the original plaintiffs.

Whether other creditors can come in after judgment, unless executions upon their respective judgments were returned unsatisfied before the commencement of the creditor's suit—*Query?*

Appeal from an order made at special term, by Mr. Justice Barbour, on the 31st of October, 1863.

The plaintiffs were judgment creditors of the defendants, Demarest & Middleton.

The action was brought by the plaintiffs, Mahlon and John B. Mattison, "in behalf of themselves and all other judgment creditors of Demarest & Middleton, who are willing to come in and participate in the relief or judgment in the action, and contribute to the expenses thereof," for the purpose of setting aside an assignment made by Demarest & Middleton to the defendant Powers, as having been made with intent to hinder and delay their creditors, and for payment of the plaintiffs' judgment out of the assigned property. A previous decision in this cause, upon another appeal affecting none of the defendants but Smith, is reported *Ante*, 238, *sub nom.* Mattison *a.* Smith.

Upon affidavits of the recovery of judgments by other creditors of Demarest & Middleton, a motion was made, on notice, that the creditors in those several judgments be made plaintiffs in this action, they desiring to become such, and that the complaint be amended by inserting allegations of the recovery of such judgments, &c., appropriate to the case; or "that this action be deemed to have been commenced and be prosecuted for the benefit of the plaintiffs in the said several judgments as of and from the time of its commencement, without the right of the defendants to claim a discontinuance of it upon payment of the judgment specifically described in the complaint, and with the same right to the said judgment creditors to come in

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ties," in the sense of the rule which renders a prior judgment conclusive upon those who sustain the character, is not restricted to those who are parties on the record; it includes all who have a direct interest in the subject-matter of the suit, and a right to make a defence or control the proceedings.

and claim under the final judgment in this action as if they had been plaintiffs named in the summons and complaint."

The motion was denied, and the plaintiffs appealed.

John Graham, for plaintiffs, appellants.—I. Unless it is held, that those obtaining judgments against the assignors, *pendente lite*, cannot participate in the final judgment in this action, and that this action was brought exclusively for the benefit of judgment creditors existing when it was brought, it is difficult to see why the motion at the special term should not have been granted. As to practice under the old system, see Morris *a.* Mowatt (4 *Paige*, 142; 1 *Barb. Ch. Pr.*, 521, 522).

II. Under section 173 of the Code, the court can add parties before or after judgment, in furtherance of justice.

III. If our view is not correct, instead of the action being brought in behalf of judgment creditors generally, willing to contribute, &c., it should have had the additional qualification, "existing at the commencement of the action."

IV. Under the old system, there was a difference between courts of law and courts of equity, as to the grouping together or combination of parties; the latter proceeded upon its favorite maxim, of preventing a multiplicity of suits, and hence was liberal in the allowance of parties. Courts of law could not so act; their framework forbade it.

Now the Code (§ 119) gives one rule as to all actions, although such as were formerly equitable are probably the only ones to demand the benefit of the rule.

V. The error of the decision appealed from was, in interpreting section 119 to embrace an existing class, when the action was brought. We hold that the judgment creditors must exist at the time the suit was brought, to come within this section, and be a class within its meaning.

VI. The class contemplated are judgment creditors, it is true, but judgment creditors in right of debts, as against which the assignors perpetrated the fraud in question. The judgment is the mere legal ascertainment of the existence of the debt.

It relates to the debt, as of when it was contracted; it is the debt which vitiates the fraud. The judgment, and the exhaustion of remedies under it, are the preliminaries to maintaining an action of this character.

VII. Section 119 of the Code applies—

1. Where there is a common interest in many persons;

2. Where the parties are very numerous, and it is impracticable to bring them before the court.

It proceeds upon the old chancery rule of preventing a multiplicity of suits. The cases on this subject are well collected in the N. Y. & N. H. R. R. Co. *a.* Schuyler (17 *N. Y.*, 592).

VIII. The rule of Innes *a.* Lansing is not to be retained as the law under section 119 of the Code.

W. H. & S. P. Bell, for defendant Smith, respondent.

I. The parties applying to be let in as plaintiffs are too late.

1. It appears on the face of the affidavits upon which they make their application, that the cause of action of each arose subsequent to the commencement of the original action.

2. To entitle them as judgment creditors to proceed against the assignor, they must have judgments unsatisfied and execution returned unsatisfied, before an action can be commenced. (2 *Rev. Stat.*, 173, § 41.) They had neither.

II. Every action must be prosecuted by the real party in interest. (*Code of Pro.*, § 111.)

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. (*Code*, § 117.)

The action is commenced when the summons is served on the defendant. (*Code*, § 99.)

The cause or right of action of the parties applying did not exist in any of them at the commencement of this action, and they are not the persons having an interest in the subject of the action, or in obtaining the relief demanded, when the action was commenced.

III. The parties applying to be made plaintiffs were not united in interest with those who brought the action, at its commencement, so as to make it compulsory for them to be joined as plaintiffs. (*Code*, §§ 1, 19.)

It is doubtful whether judgment creditors are embraced in this section.

IV. There is no existing statute or rule, by which these parties can demand to be let in as plaintiffs, *nunc pro tunc*, so

as to have relation back to transactions done in good faith by the assignee, before they had a cause of action. Whatever is done in good faith by the assignee, before the assignment is declared void, is well done. (Wakeman *a.* Grover, 4 *Paige*, 42; *Burrill on Assignments*, 505, 546.)

V. If there be several parties having a common interest, one of them may bring his action in his own right, and on behalf of others having a common interest; but the nature of their common interest must be such as would entitle them, were they all before the court, to maintain the action in their own right or in their own names. (Habitch *a.* Pemberton, 4 *Sandf.*, 657; Smith *a.* Lockwood, *Code R., N. S.*, 349; 13 *Barb.*, 218.)

Now the plaintiffs in the complaint profess to commence the action for themselves, and all other judgment creditors of William S. Demarest & G. A. Middleton, who are willing to come in and participate in the relief or judgment in this action, and contribute to the expenses thereof; and plaintiffs therein complain, &c. They profess to bring this action for imaginary parties, men of straw, at the commencement having no existence in reality, but made such afterwards.

VI. These subsequent judgment creditors cannot, by this movement, take precedence of other simple contract creditors provided for in the assignment. Their remedy is, if the present plaintiffs succeed, to ask to come in at the foot of the decree, as was the practice in the court of chancery in similar cases, which practice in equity has not been abolished by the Code. (4 *Paige*, 142.) The 173d section of the Code is not a substitute for this practice. (See *Rules of Ch.*, 1837, rules 43 and 190, and notes.)

VII. They have not such an interest as would entitle them, by section 122 of the Code, to be made parties plaintiffs, as this section relates to recovery of real or personal property specifically. (Judd *a.* Young, 7 *How.*, 79; Talman *a.* Hollister, 9 *Ib.*, 508.)

By the Court.*—Monell, J.—The first branch of the motion was in effect abandoned on the argument.

The second branch proceeds upon the apprehension that the

* Present, Bosworth, Ch. J., and Monell, J.

defendants may pay the judgment of the plaintiffs, and compel a discontinuance of the suit; in which event, the other creditors, who now seek to come in, would be deprived of the benefit of the present action.

The defendants have answered the complaint, and, it would seem, intend to contest the plaintiffs' right to the relief they seek, and there is no proof before us of any intention to pay the judgment, or to procure a discontinuance of the suit.

The action purports to have been instituted by the plaintiffs in behalf of themselves, and of all other judgment creditors, who might desire to come in and participate in the benefits of the suit; and it is claimed, that the creditors now applying to come in should be deemed to be plaintiffs from the commencement of the action, and that the suit should not be discontinued without payment of their judgments.

This, certainly, is a novel motion, and is without precedent in the books.

It was long since decided by the chancellor (Edmeston *a.* Lyde, 1 *Paige*, 637), that a creditor might file a bill in behalf of himself and all other judgment creditors, who might choose to come in under the decree, and contribute to the expenses of the suit. It was necessary, however, that such creditors should stand in the same right with the complainant, and that they should have had executions upon their judgments returned unsatisfied.

In the case before us, no such right is shown. On the contrary, it appears that at the time of the commencement of this action, executions upon the judgments in favor of the creditors who now apply, had not been returned. They were not, therefore, at that time, in a condition to have instituted a suit for the equitable relief demanded in this action.

The rights of creditors, for whose benefit a suit of this nature was instituted, were to come in under the decree, prove their judgments and executions returned unsatisfied, and participate in the fund discovered by the suit. They never became parties to the suit, and were only entitled to come in after the decree. The suit proceeded to decree, in the name and upon the judgment of the original plaintiff; and he might prosecute it with dispatch, or dismiss it altogether, at his election, notwithstanding the bill was filed in behalf of himself, and of all other cred-

itors. (Innes *a.* Lansing, 7 *Paige*, 583.) The reason was, that each creditor, whose execution had been returned unsatisfied, might file his bill. But the moment the decree was entered in the suit, the rights of the other creditors attached to it, and the proceedings in all the other suits were or might be stayed.

The rule then in chancery was, that notwithstanding the bill was filed for the benefit of all the creditors, the defendant might pay the judgment and costs, and procure a dismissal of the bill.

Has this rule been changed by the Code? The right to file a bill by a creditor after the return of an execution unsatisfied, as provided in the Revised Statutes (2 *Rev. Stat.*, 173 [marg. p.], § 38), has not been abrogated by the Code (Neustadt *a.* Joel, 2 *Duer*, 530); and the jurisdiction exercised by the chancellor under this statute, is now exercised by this court.

The essential ingredient in these suits, is the return of an execution *nulla bona*. Until this is done, the creditor has no right to claim equitable relief.

It is said that the 119th section of the Code has changed the rule. That section provides, that when the question is one of a common or general interest of many persons, &c., one or more may sue for the benefit of the whole. The provision is new, and has not, I believe, received a judicial construction as to its intended effect. Probably it is a mere enactment of the rule of the court of chancery, and was intended to apply to those cases where parties might make a common suit. Whether this be so or not, there is nothing in the provision which gives to it the effect of depriving a plaintiff, suing for a common benefit, of all right of control over the suit. Nor does it, in my judgment, confer any power upon the court to restrain a plaintiff thus suing, from dismissing his suit.

Creditors not parties to the suit acquire no vested rights until the judgment, when they may come in and prove their claims. And the plaintiff and defendant must be left, until judgment, to prosecute and defend upon the principles applicable to the case, without regard to any supposed injury which the other creditors may suffer.

In the view I have taken, it is not necessary to determine whether those creditors are in a condition to come in. Their executions were all returned after the commencement of this

suit. It would seem to be quite well settled, that even after judgment they would not be allowed to prove their claims. (Parmelee *a.* Egan, 7 *Paige*, 610; Cooke *a.* Smith, 3 *Sandf. Ch. R.*, 333.)

But I can find no authority for granting the plaintiff's motion. The rule on the subject was well settled before the Code, and the Code has not changed it.

The creditors are not without an adequate remedy. They may wait until judgment is obtained in this action, and then come in; or bring suit at once on their judgments. If they wait, they must take the risk of having the suit discontinued on payment of the plaintiff's judgment and costs. We cannot restrain them.

The order should be affirmed, with ten dollars costs.

WALSH *a.* GREGORY.

Supreme Court, First District; General Term, May, 1865.

APPEAL.—DEFAULT.

The provision of the Code of Procedure (§ 256), that in the first judicial district there need be but one notice of trial from either party, does not apply to notice of argument on an appeal to the general term.

Appeal from an order.

In this action, an order had been made directing a commitment for disobedience of an injunction, and from this order the defendant appealed. The appeal was placed on the non-enumerated calendar for the February term, and a notice of motion to dismiss the appeal and also of argument was served by the respondent's attorney for that term, but no notice was served by him for the present term. When the case was called for argument at the present term,

Levi S. Chatfield, for the appellant, objected that no notice of argument had been served.

Francis Tillou, for the respondent, admitted the fact, but contended that in this district only one notice of argument of an appeal was necessary.

By the Court.*—Leonard, P. J.—We decided last term that this section does not apply to notice of argument, and a default cannot be taken at a general term for which the appeal is not noticed.

The case must go over.

SPARKS *a.* LEAVY.

New York Superior Court; General Term, December, 1863.

Parties in Action for Injury to Real Property.—License to remove Fixtures.—Remedy on fraudulent Purchase of Goods.

Where one of several persons, who hold the legal title to real property as tenants in common, is in possession under an agreement by which the others have released their interests and agreed to convey to him, he may alone maintain an action for an injury to the premises by a third person, and may recover the whole damages.†

The owner of real property, being applied to by one who had furnished certain fixtures which he had not been paid for, for leave to enter and remove them, gave him to understand that he himself had no objection, but that he could not give his express consent, for fear of trouble with the mortgagees. *Held*, that this was not a license to remove them, and that he was not thereby estopped from suing him for their removal.

Where a contract for the sale of goods, after having been executed on the part of the seller, is cancelled by the parties, and a new contract as to the mode of payment is substituted in place of it, the seller cannot rescind the sale and reclaim the goods, by reason of a fraudulent intent, on the part of the buyers,

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* Present, Leonard, P. J., Clerke and Barnard, JJ.

† Upon the question whether the plaintiff in this action had proved such equitable ownership in himself, Barbour, J., dissented.

not to pay therefor, existing only at the time of the original contract. And the mere failure to perform the new contract is not sufficient to show that the fraudulent intent continued in respect to the new contract.

Exceptions taken at the trial of the cause, and directed by the court to be heard in the first instance at general term.

This action was brought by William H. Sparks against Thomas Leavy, to recover damages caused by the wrongful entry of the defendant into a house, described in the complaint as No. 224 East Fiftieth-street, and alleged to have been owned and possessed by the plaintiff at the time of such entry, and for the severance and removal therefrom of certain marble mantels, of the value of four hundred dollars, which were set and affixed to the freehold. The answer denied that the plaintiff was the owner or in possession of the premises or of the mantels at the time of the alleged trespass, as well as that such mantels were wrongfully removed; averred that, in such removal, no injury was done to the premises; and admitted the value of the mantels to have been $385.

The cause was tried on the 27th of February, 1863, before Mr. Justice Monell and a jury.

Upon the trial, the plaintiff proved that, at the time of the alleged trespass, he was in possession of the house described in the complaint, by a person whom he had placed therein to take care of it; that the ground upon which it stood had, some time prior to the commission of the trespass, been conveyed to the plaintiff and his two partners, Walling and Hesler, who caused the house thereon to be erected; and that during the progress of such construction, the defendant furnished and put up the marble mantels, upon a contract whereby a credit was given to the owners of the building. The plaintiff then read in evidence a written instrument, under seal and witnessed, executed before the trespass, by himself, Walling, and Hesler, which—after reciting that the parties had theretofore been engaged as partners in the business of building houses and buying and selling real estate, and had acquired and then possessed certain real and personal property (undescribed), and that they had agreed to dissolve the partnership and divide their property among them—declared that such copartnership was dissolved, that Walling and Hesler "shall have and possess, free

from all claims of the party of the first part" (the plaintiff), certain lots and premises in the city of New York, described by metes and bounds (and not by street numbers); and that "the party of the first part shall have and possess all the rest, residue and remainder of the said real and personal property." To this was added a mutual covenant that each of the parties should make, execute, and deliver to the others all such deeds and instruments in writing as should be necessary to carry the agreement into effect.

Upon the closing of this evidence, the plaintiff claimed to recover the admitted value of the mantels, and rested. The defendant thereupon moved for the dismissal of the complaint, raising the objection, among others, that the deed or agreement executed by the plaintiff and his partners, above referred to, did not describe the house in question, nor show that it was, or was intended to be, included among the parcels set apart to the plaintiff. The motion was overruled, and an exception taken.

The defendant then attempted to prove, by his witnesses, that he had permission from the plaintiff to remove the mantels; and then again moved to dismiss the complaint, which was refused, and exception taken.

The court directed the jury to find a verdict in favor of the plaintiff for $385, being the value of the mantels, to which the defendant excepted; and the court directed the entry of the judgment to be suspended, and the exceptions heard, in the first instance, at general term.

During the progress of the trial, evidence was offered by the defendant for the purpose of showing, by way of justification, that he was induced to furnish the mantels by certain fraudulent representations of the plaintiff; which testimony was excluded, and the defendant excepted.

The material parts of the testimony are stated in the opinion of the court.

The justice presiding at the trial directed a verdict for the plaintiff, the exceptions to be heard, in the first instance, at general term.

J. Graham, for the defendant.

A. M. Burr, for the plaintiff.

By the Court.*—Robertson, J.—Under the old system of pleading, the present action would have been considered as one of trespass for breaking the plaintiff's close, carrying away chattels, and injuring the freehold by committing waste. Possibly, under that system, unless the license to the defendant to enter was void as obtained by imposition, the action, as one of trespass for breaking the plaintiff's close, could not have been maintained (Dumont *a.* Smith, 4 *Den.*, 319), and the right of action for the other injuries, which were merely *alia enormia*, might have fallen with it. The present liberal system of pleading makes the complaint one for three causes of action, a wrongful entry on lands, injury to the premises in taking down certain fixtures, and carrying away and converting them.

The plaintiff derived title to an undivided third of such chattels so converted, by a deed to himself and his two partners (Walling and Hesler), of the premises of which they were fixtures, in October, 1861. He claimed, however, an equitable title to the whole ownership, with the right of possession thereof, under an agreement made in January, 1862, between himself and his partners, dissolving their partnership, and agreeing to a division of partnership property. By it, the plaintiff's partners agreed that he should have and possess, among other property, the premises in question, and to execute all deeds or instruments in writing necessary to carry such agreement into effect. Under that agreement, the plaintiff entered into possession of such premises; and placed an occupant in them to take care of them for him without rent.

Any one in actual possession of premises may bring an action for an injury done to such possession. (9 *Bac. Abr.*, 458, tit. Trespass, ch. 3.) But by the contract to convey, the plaintiff became the equitable owner of the premises immediately, and all the fixtures. (2 *Story, Eq. Jur.*, 628, §§ 789, 790, 1212.) Nothing further was to be done on his part to entitle him to a conveyance, so that any loss would fall on him, and not on the legal owners. (1 *Sugd. on Vend.*, 115, 213, 276, 277.) He was therefore entitled, as the party damnified, to sue for the value of such fixtures, and any other injury. (Gardner *a.*

* Present, Robertson, White, and Barbour, JJ.

Heartt, 2 *Barb., S. C.*, 167; Rood *a.* N. Y. & Erie R. R. Co., 18 *Ib.*, 80, 83.)

The objection of non-joinder of the other legal owners of the fixtures would merely influence the question of amount of damages, since in actions for injuries to real estate, the non-joinder of tenants in common can only be taken advantage of by plea in abatement. (Wheelwright *a.* Depeyster, 1 *Johns.*, 471; Brotherton *a.* Hodges, 6 *Ib.*, 108; Bradish *a.* Schenck, 8 *Ib.*, 157.) Even if the defect had appeared on the face of the complaint, it could not have been taken advantage of by demurrer, motion in arrest of judgment, or writ of error. (Addison *a.* Overend, 6 *T. R.*, 766; Scott *a.* Godwin, 1 *Bos. & P.*, 74, 75; Rich *a.* Penfield, 1 *Wend.*, 380, 385, 386.) After judgment by one tenant in common, another could sue and recover for the damage to his interest. (Sedgworth *a.* Overend, 7 *T. R.*, 275.) The rule is different in actions on contracts relating to real estate. (Hill *a.* Gibbs, 5 *Hill*, 56.) This rule, however, would reduce the plaintiff's damages two-thirds. To recover the whole value he must rely on his equitable ownership and right of possession, unless the defendant, by severing the fixtures from the freehold, made them chattels, and the plaintiff legal owner.

The only evidence offered to prove a license to enter or carry away the chattels was the defendant's own testimony. He stated that he applied to the plaintiff to let him take them away in payment of the claim he had against them for affixing them to the freehold, and the plaintiff promised to consult his counsel. The latter afterwards told the defendant he had done so, and was advised by such counsel not to consent to such removal. He did not say *the defendant might remove them; but gave him to understand* "he had no objection to the removal *as far as he was concerned*, but could *not give his express consent*, for fear of trouble with the mortgagees." This was certainly not a transfer of the property in the chattels in satisfaction or on account of the claim, supposing the plaintiff had a right to make it without consent of the mortgagees. Whatever the rights of others were, or his duty to protect them, he certainly thought the mortgagees had some claims, and showed he did not mean to infringe them by a transfer of part of their security. Whatever his motive was, he had a full right to withhold his consent to any transfer, after the chattels had be-

come his by being affixed to the freehold. The occupants of the premises were mere tenants by sufferance, and had no right to give any license to injure the premises. In the cases of Thompson *a.* Blanchard (4 *Comst.*, 303), Edgerton *a.* Thomas (5 *Seld*, 40), and Ford *a.* Williams (24 *N. Y.*, 359), innocent persons were induced to part with value or to do some act, by the failure of a real owner or party interested to object. In this case the plaintiff did nothing to induce the defendant to carry away what did not belong to him, and appropriate it to his own use, and was therefore not estopped from reclaiming it.

Any fraudulent intention on the part of the plaintiff, in August, 1861, when jointly with his partners he agreed to pay the defendant for affixing the chattels in question to the realty, would not be available in this case. By the terms of such agreement, the latter was to be paid by instalments, in cash, as his work advanced, and by the conveyance of a house and lot. In January following, he accepted a lot of land, his own note for $350, and the note of the plaintiff's firm for $385, at six months, in full satisfaction for his dues under such agreement. The agreement was then cancelled by mutual consent, in writing, and declared void. The defendant had evidently received large payments on account of such contract, between August, 1861, and January, 1862. The mere existence of judgments against the plaintiff, at the former date, by itself, was very remote evidence of an intention, on the part of his firm, not to pay. It is very doubtful whether an intention by one of three joint contractors not to pay, would be sufficient to avoid the contract, even under the decision in Hennequin *a.* Naylor (24 *N. Y.*, 139). But unless that intention continued in January, 1862, and applied to the new contract then made on the settlement, I apprehend its existence in August, 1861, was immaterial. The defendant ratified the first agreement by doing the work and receiving nearly all his pay progressively under it for over six months, and finally substituting a new agreement in place of it, and cancelling it. Whether a preconceived intention not to perform such new contract by the plaintiff would vitiate it, and remit the defendant to his rights under the old contract, so as to enable him to reclaim the articles furnished under it, is not necessary to be passed upon, as there is no evidence to establish such intention. The mere failure to give the

deed or note stipulated for in such new contract, or pay the note of the plaintiff's firms, would not be sufficient or relevant to establish it. Such failure may be sufficient, as a non-performance of the condition on which the discharge contained in such new contract was given, to enable the defendant to sue generally, as he had a right to do, or perhaps even to sue upon the original contract, for the amount due him for goods furnished and his labor; but would not authorize him to rescind that contract for fraud in its inception, so as to reclaim the articles furnished. He waived that right by agreeing to cancel the old agreement, substitute the new, and accept the deed and two notes in full satisfaction, without any fraud practised on him. The exceptions to the questions as to the existence of judgments against the plaintiff, in August, 1861, and the failure to give the defendant the deed and his note mentioned in the agreement of January following, were not well taken. It is to be observed, also, that the defendant has never offered to return any benefit received by him under either agreement except the note of the plaintiff's firm; and on that occasion it was not as a right, but as a favor, he asked to get back his goods furnished. He still holds, for aught that appears to the contrary, the contract of Michel Barker to deliver him a deed of the lot in 74th street, and any lot conveyed to him pursuant to the contract of August, 1861.

Whether, therefore, the defendant entered on the premises lawfully, or was a trespasser *ab initio*, is immaterial; he is liable for carrying away and converting the fixtures in question, and the damage to the premises by so doing. He has fixed their value in his answer, and has not contradicted it by other evidence, and was at least liable for that amount which is the limit of the plaintiff's claim.

The exceptions were properly overruled. The motion for a new trial ought to be denied, and the plaintiff allowed to enter judgment on the verdict in his favor.

Barbour, J. (after stating the facts).—The evidence as to fraudulent representations, alleged to have been made by the plaintiff, was, I think, properly excluded by the court. Certainly, the defendant had no right forcibly to sever the property from the freehold to which he had himself affixed and

annexed it, even though the contract, under which the work was done, was procured by fraud. His remedy was by action against the person by whose fraudulent representations he had been induced to part with his property, and to convert it into realty.

I am of opinion, also, that the motions to dismiss the complaint were properly overruled. Without passing upon the validity of the written agreement of the plaintiff and his two partners as a legal or equitable conveyance, because it is unnecessary now to consider that question, it is sufficient to say that there is nothing contained in that instrument, nor in any evidence given in the cause, tending to prove that the premises in question were covered by its provisions, in order to show that the house belonged to the plaintiff and his two partners, as tenants in common, and not to the former alone; and the rule in this country is, that, for a trespass upon lands, the action must be brought by all the owners, or persons standing in like relation to the property, and cannot be sustained by one of them alone, if an objection to the non-joinder of the others is taken by the pleadings. (See Hill *a.* Gibbs, 5 *Hill*, 56, and *note.*)

But where, as in this case, no objection for want of parties is made by the answer, and it appears upon the trial that the action has been brought by one, only, of several tenants in common, the suit is not thereby abated, but the plaintiff may proceed and take a verdict and judgment for his aliquot share of the damage sustained by all (*Ib.*), leaving his co-tenants to bring their separate action for the injury done to them. (Sedgworth *a.* Overend, 7 *T. R.*, 275.)

The plaintiff, therefore, was entitled to recover the damage he had himself sustained, but not for the injury to the others; and for that reason it appears to me the peremptory direction to render a verdict for the full value of the property was erroneous.

The verdict should be set aside, and a new trial granted, with costs to abide the event.

Judgment for the plaintiff on the verdict.

COCK *a.* PALMER.

New York Superior Court; General Term, May, 1863.

APPEAL.—MOTION.

When the parties to an action have settled the judgment, and the plaintiff has acknowledged satisfaction, the court will not hear an appeal which had been previously taken, merely because the plaintiff's attorney desires judgment on the appeal for the protection of his right to costs. If the settlement of the judgment is a fraud on his rights, his remedy is by motion.

Motion to dismiss an appeal.

The facts are stated in the opinion.

BY THE COURT.*—BOSWORTH, Ch. J.—It appears that the parties to this action have settled the judgment appealed from, and that the plaintiff has acknowledged satisfaction of the judgment. It does not distinctly appear that the judgment has been satisfied of record, inasmuch as the paper read by the defendant as an affidavit made by him is not sworn to. If the defendant had not in fact sworn to it, the reading of it as an affidavit actually sworn to is highly reprehensible.

The plaintiff's attorney should not issue execution on a judgment satisfied of record, nor an appellate court hear an appeal from it, taken by the defeated party, when the attorney of the party acknowledging satisfaction is the only person asking for judgment on the appeal, and the opposite party objects to further proceedings on the appeal, on the ground that the judgment is satisfied of record.

The plaintiff's attorney, if he thinks the settlement and discharge of the judgment are a fraud on his rights, should move to vacate the entry of satisfaction, as was done in Rooney *a.* The Second Avenue R. R. Co. (18 *N. Y.*, 368), or move for an order that the defendant pay his costs, as in Reade *a.* Dupper

* Present, BOSWORTH, Ch. J., and MONCRIEF and WHITE, JJ.

(6 *T. R.*, 361); and see Backer *a.* St. Quintin (12 *Mees & Welsby*), and Carpenter *a.* Sixth Avenue R. R. Co. (1 *Am. L. R., N. S.*, 415, 416), and note to the same (*Ib.*, 423, 4, *Remedies.*)

The cause must be stricken from the calendar, because it appears that the judgment has been settled and satisfaction of it acknowledged; and the plaintiff's attorney be left to his motion to vacate the entry of satisfaction, and for leave to proceed in the action to collect his costs, or to take such further course as he may be advised.

This motion is granted, without costs.

COWDREY *a.* CARPENTER.

New York Superior Court; General Term, December, 1863.

UNLAWFUL STIPULATION.—AGREEMENT FOR A CERTAIN DECISION BY THE COURT.

An agreement to pay liquidated damages, in the event that in a suit then pending the court shall fail to make an order with a specified provision affecting substantial interests, is void. If it contemplate an order which would be inequitable or contrary to settled practice, it is against public policy; and even if it contemplate an order such as is usual to make in like cases, it is in the nature of a wager, and prohibited by the Statute of Betting and Gaming.

Thus where a party to a suit for the foreclosure of a mortgage of real property, on assigning a junior mortgage which covered only a part of the same premises, stipulated with his assignee that the order of sale in the foreclosure should direct the property not covered by the junior mortgage to be first sold for payment of the prior mortgage,—

Held, that the stipulation was void, and the assignee could not recover liquidated damages provided by it, upon its breach, by the making of an order not containing any such provision, and the sale of the whole premises without producing enough to pay the junior mortgage.

Appeal from a judgment entered upon a verdict, recovered by the plaintiff on a trial before Mr. Justice MONCRIEF and a jury, on the 12th of May, 1862.

The action was brought by Nathaniel A. Cowdrey against Jacob Carpenter. The facts were as follows:

In August, 1860, the defendant sold to the plaintiff a bond and mortgage of $2,000. The mortgage covered two lots of land in this city. It was made by one Coit to E. H. Hawke, the defendant's assignor. There was a prior mortgage of $5,000 covering the two lots, and also other property adjoining. This prior mortgage was made by B. W. Bonney to Alfred Roe. At the time of the sale to the plaintiff of the $2,000 mortgage, this prior mortgage was being foreclosed, by suit brought for the purpose, to which Carpenter was a party defendant. Carpenter, upon the sale of the $2,000 mortgage to the present plaintiff, agreed with him "that the order of sale under the foreclosure proceedings on said five thousand dollar mortgage shall require the other property not covered by the $2,000 mortgage to be first sold, and the proceeds applied to the satisfaction of said five thousand dollar mortgage."

The $5,000 mortgage was foreclosed, and the whole premises were sold together. There was no provision or direction in the order of sale requiring the other property not covered by the $2,000 mortgage to be sold first.

There was a surplus, after satisfying the $5,000 mortgage, principal, interest, and costs, of $783.25, which the plaintiff received. Thereupon he brought this action to recover the residue from the defendant.

The judge charged the jury that the plaintiff was entitled to recover the $2,000 which in the agreement he had agreed to pay as liquidated damages, if said order did not contain the direction aforesaid, less the amount of surplus moneys he had received.

The defendant excepted, and appealed from the judgment.

A. R. Dyett, for defendant, appellant.

F. N. Bangs, for plaintiff, respondent.

By the Court.*—Monell, J.—If the contract is valid, the plaintiff is entitled to recover the $2,000, as damages liquidated

* Present, Bosworth, C. J., White and Monell, JJ.

and agreed upon by the parties. The damages relate to a single breach or default; they were entirely uncertain, and were the proper subject of liquidation by the parties; they were so liquidated, and hence are not a penalty. (Clement *a.* Cash, 21 *N. Y.*, 253.)

If the defendant's contract is to be deemed a promise that he would procure an order of sale containing the stipulated provision, it is a contract which he had not the power to perform; and this must have been known to both parties. If it is to be regarded as a contract to induce the court to make an order which was inequitable or contrary to its settled practice, it is illegal and void.

It is to be inferred, probably, that Mr. Bonney, when he gave the $5,000 mortgage to Roe, owned all the lots covered by it. But it does not appear whether he first aliened the two lots mortgaged to Hawke, or the other lots. There is nothing to show affirmatively that he ever conveyed any of them. It may be inferred that Coit could not have mortgaged the two lots without having the title. If the two lots were first aliened, then the other lots might have been ordered to be first sold. (Rathbone *a.* Clark, 9 *Paige*, 648).

We must presume the court made the order of sale according to its established practice in such cases. There is nothing in the case from which we can arrive at a different conclusion; and as the facts do not leave it open for the suggestion that the established practice of the court was not followed, the defendant has presumptively contracted that the court would make an order contrary to its established practice, or an inequitable order. Such a contract would be void.

A promise to pay $2,000, or any other sum, as liquidated damages, in the event that in a suit then pending the court shall fail to make an order, with a specified provision, affecting substantial interests, we think is contrary to public policy, and therefore void. If the order stipulated for be such as it has been usual to make in like cases, then the contract is a wager, that, in the case covered by the contract, the court will decide in a particular manner. Such a contract is void.

Whether such a contract would have been void at the common law, is perhaps not clear; but under our statute (1 *Rev. Stat.*, 662, § 8), all wagers, bets, or stakes made to depend upon

any lot, chance, casualty, or unknown or contingent event whatever, are declared to be unlawful. Independently, therefore, of its being a contract opposed to public policy, I think it is also in the nature of a wager, and prohibited by statute. (Hall *a.* Bergen, 19 *Barb.*, 122).

We think the learned judge erred in his direction to the jury, and that he should have dismissed the complaint.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

STILWELL *a.* THE MAYOR, &c., OF NEW YORK.

New York Common Pleas; General Term, May, 1863.

MUNICIPAL CORPORATIONS.—PUBLIC OFFICERS.*

A city corporation may be compelled to pay the expenses incurred by one of its officers, by the employment of his own counsel, in a contest to gain the possession of its property, in the result of which it is interested; and an act of the

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* In the Matter of Charges against MATTHEW T. BRENNAN and others (*before the Governor of New York, at Albany, September* 27, 1865), the jurisdiction and power of the governor to remove municipal officers for official misconduct, and the mode of proceeding, were declared by him.

Certain charges and specifications of malversation and misconduct in office, violation and neglect of official duty, and corruption, against C. Godfrey Gunther, mayor of the city of New York; Matthew T. Brennan, comptroller of the city of New York; Francis I. A. Boole, city inspector of said city; and John E. Develin, corporation counsel of said city, duly verified, were submitted to his excellency, Reuben E. Fenton, governor; and application thereon made to him for the removal of said officers of the State of New York. The governor furnished each of said officers with a copy of the charges and specifications, and summoned them to appear and answer thereto on Tuesday, the 26th day of September, 1865, at 10 o'clock in the forenoon, at the executive chamber at the Capitol.

One of the charges was made by James Gregory against all of said officers for violation of official duty and corruption in awarding the contract for cleaning the streets of New York to Brown, Devoe and Knapp, who were not the lowest re-

Legislature allowing the charge as proper, and directing the supervisors to raise it by tax, is conclusive on the city.

Where an act of the Legislature has declared a claim against the city valid, and has provided the means and manner of raising the money to pay it, it becomes

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sponsible bidders for the work; such contract having been made by these officers as commissioners, in pursuance of the Laws of 1865, ch. 646, § 1.

One of the charges was made by Edward F. Plum against the city inspector for malversation and misconduct in office, neglect, and violation of duty.

One of the said charges was made by Anson Herrick and others against the comptroller for the same causes.

One of the said charges was made by Thomas N. Carr against the corporation counsel for the same.

On the 26th of September all of the accused officers, and the prosecutors, with their respective counsel, assembled at the Capitol and appeared before Governor Fenton in obedience to the summons.

James Emott and *Nelson J. Waterbury* appeared to prosecute the charge against the street-cleaning commission.

John McKeon appeared to prosecute the charges against the comptroller on behalf of the Citizens' Association.

Joseph F. Daly appeared to prosecute the charges against the city inspector and the corporation counsel on behalf of the Citizens' Association.

James T. Brady and *Abraham R. Lawrence, Jr.*, for the comptroller.

John H. Reynolds, for the corporation counsel.

Hamilton Harris, for the city inspector.

John H. Anthon, for the mayor.

The charges and specifications were then read, as well as the several answers of the parties accused.

It was admitted by the prosecution that no case was made out against the mayor.

All the other accused officers united in the following preliminary objections:

1st. That the governor had not power to remove these officers.

2d. That even if he had such power, he had no right to try the issues presented by the answers, but must send them to the district attorney of the city and county of New York to take proof before a county judge and a jury.

The prosecution relied upon the Constitution, Art. X., sections 1, 7, and 8; the charter of New York city of 1857, § 20; and the act of 1863, ch. 68, § 1.

Governor Fenton.—The objections to the governor's jurisdiction and the arguments of counsel upon both sides have been carefully considered by me, and I am clearly of the opinion—

First. That the Constitution and the laws have conferred upon the governor full jurisdiction in these cases.

Second. That the investigation may be heard before me.

the duty of the comptroller to settle and adjust it, whether the act directs him to draw his warrant or not; and the insertion of such a direction in the act does not confine the remedy of the creditor to proceeding by mandamus against the comptroller; but upon his refusal to draw a warrant for the sum, an action lies for the amount against the city.

Appeal from a judgment overruling a demurrer.

The allegations of the complaint in this action, which was brought by Benjamin M. Stilwell and Shubael E. Swain, were as follows:

On the 24th day of December, 1860, Nathan C. Platt was duly removed from the office of city chamberlain, and on the same day Daniel Devlin was duly appointed to that office, and being qualified, he entered upon the discharge of the duties of the office, and selected the Broadway Bank as the depository of all moneys belonging to the city and county of New York.

While Platt was in office, he had selected the Park Bank as the depository of these moneys, and at the time of his removal, and Devlin's appointment, there was in that bank upwards of four millions of dollars of these moneys deposited by Platt as such chamberlain.

After his removal, Platt refused to deliver to Devlin the books, papers, and securities in his hands, or to order the transfer of the moneys to the Broadway Bank.

And the Park Bank refused to transfer the moneys deposited with it to the Broadway Bank.

Third. That the testimony taken before me may be reduced to the form of affidavits, and sworn to, as the power is expressly given by the laws to the governor to administer an oath whenever an affidavit is required in any proceedings before him.

While, therefore, I feel bound to hold that the governor has the power to remove in these cases, I am equally bound, by a sense of justice to individuals holding high offices, by my duty to the public, and by my own position, not to exercise the right, except upon clear, positive, and undoubted proof of the charges preferred.

The secretary then read, by direction of the governor, the opinion of Governor Seymour in the case of Thomas C. Acton, when charges were made against him before the governor. This opinion declared the jurisdiction and power of the executive as here laid down by Governor Fenton. (See minutes of the governor in the proceedings against Acton, at the Capitol, Albany.)

The governor afterwards appointed a time and place in the city of New York to hear and determine the charges.

Whereupon, the plaintiffs Benjamin M. Stilwell and Shubae E. Swain, at the request of Devlin, instituted legal proceedings against Platt, to obtain the books, papers, &c., and against the Park Bank, to compel the transfer of the moneys; in both of which proceedings they were successful.

The complaint further alleged that, upon the appointment of Platt, a litigation arose between him and his predecessor as to the title to the office, and that for the purpose of settling the ambiguities of the law under which the appointment was made, they, at the request of Devlin, prepared a bill, which they presented to the Legislature, and appeared in person and by counsel before the committee, to whom the bill was referred, and were successful in obtaining its passage. That in all the legal proceedings, as well as in the arguments before the committee at Albany, various eminent counsel were employed, and their fees, charges, and expenses were paid by the plaintiffs at the request of Devlin—which fees and charges amounted to and were reasonably worth the sum of $22,765.67; that the plaintiffs prepared a bill for that amount against Devlin, but believing that such expense was a proper charge against the city, they presented their bill to the Legislature, who referred it to the committee having the tax-levy in charge; that the committee, after investigation and hearing counsel, recommended its insertion in the tax-levy; that thereupon the Legislature passed the Act of April 17, 1861, three-fifths being present, empowering the supervisors of the city and county of New York to raise the sum of twenty-two thousand seven hundred and sixty-five dollars and sixty-seven cents ($22,765.67), which the act declared should be paid to the chamberlain for the expenses incurred by him, and directing the comptroller to draw his warrant in favor of the city chamberlain for that amount. That the amount has been raised by tax, has been collected, and is now in the city treasury, and cannot be applied to any other purposes than the payment of Devlin's expenses.

That Devlin has assigned to the plaintiffs the claim against the city and county of New York, of which assignment the comptroller has notice.

The defendants demurred to this complaint, upon the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled at special term, and judgment entered for plaintiffs, and the defendants appealed.

John E. Develin for the appellants.—I. The retainer of the plaintiffs by Devlin, and the rendition by them of the services mentioned in the complaint, did not create any liability against the plaintiff.

a. The corporation was entirely competent to protect and vindicate any interests it might have in the controversy between Devlin and Platt. It cannot, therefore, be held responsible for costs, charges, and expenses incurred in legal proceedings instituted without its authority, to which it was not a party, and in the management and prosecution of which it had no voice or control.

b. As city chamberlain, Devlin had no power to employ counsel at the expense of the corporation; as the officer of the corporation, he was the custodian of the corporate funds, and the paymaster of its indebtedness. (*Charter*, 1857, §§ 22–26.)

Special acts of the Legislature were deemed necessary to empower the comptroller to employ counsel, other than the counsel to the corporation, to institute legal proceedings in which the corporate interests were involved. (*Valentine's Laws*, p. 739, § 5; *Ib.*, p. 1,233, § 9.)

c. Even an ordinance of the common council, assuming the payment of the expenses incurred by Devlin, would have been ineffectual to create any liability against the corporation. (Ramson *a.* Mayor, 24 *Barb.*, 226; Roberts *a.* Mayor, 5 *Abbott's Pr.*, 42; Halstead *a.* Mayor, 3 *Comst.*, 430.)

II. The act of 1861 does not create any liability against the defendants.

a. The intention of the Legislature in inserting in the tax-levy the provision relied upon by the plaintiffs, was, as is declared by the language of the act, to reimburse Devlin for expenses incurred by him in procuring a transfer to himself of the books and securities of the office of chamberlain, and in defending and establishing his title to that office. (*Laws* 1861, pp. 669, 670.) It is apparent, both from the language used in the act, and the means employed to realize the desired sum of money, that it formed no part of the intention of the Legislature to make the corporation Devlin's debtor to that amount.

The Legislature, in passing the act in question, were not engaged in creating a debt, but in imposing a tax. It was not their design to impose the burden of reimbursing Devlin upon the corporation of New York; but, as they have declared in the act, that burden was to be borne by the taxable estates in the county of New York. It is submitted, therefore, that the Legislature, in imposing a tax upon the taxable estates in the county of New York, did not create a debt against the corporation of the city of New York.

III. If the effect of the act is to create a debt against the corporation, then it is unconstitutional and void.

a. The corporation of the city of New York is possessed of real estate and other property. (*Montgomery Charter*, § 1; *Davies' Laws*, p. 165; *Ib.*, p. 199.) As regards its private property, and its disposition, the rights of the corporation are as perfect, and it is as free from legislative control, as is any private individual in the possession and enjoyment of his property. The creation, therefore, of a debt against the corporation, which can be enforced by suit, judgment, and execution, is beyond the power of the Legislature, and a violation of the constitutional rights of the defendants. (*Const.*, art. 1, §§ 1, 6; Taylor *a.* Porter, 4 *Hill*, 145; Wynehamer *a.* People, 3 *Kern*, 392; Powers *a.* Bergen, 2 *Seld.*, 358; Van Valkenburgh *a.* Mayor—Opinion of *Clerke*, *J.*; People *a.* Haws, 37 *Barb.*, 440, 454.)

IV. The refusal of the comptroller to draw his warrant in favor of Devlin, as directed by the act, does not render the corporation liable.

a. The act imposes no duty upon the corporation. In the payment of the money, the comptroller does not act as the officer or agent of the corporation, nor does he owe any duty to the corporation with respect to the fund. The corporation having no interest in, or control over the fund, could not compel the comptroller to draw his warrant as directed by the act.

The true relation of the comptroller to this fund, is that of a *quasi* civil officer of the government, and for his omission to perform a duty specifically imposed upon him by statute, the corporation cannot be made responsible. (Martin *a.* Mayor, 1 *Hill*, 550.)

V. The defendants cannot be held liable, as for money had and received to the use of the plaintiffs.

a. The money sought to be recovered, is the gift of the Legislature to Devlin.

In order to complete and perfect this gift, we find the Legislature making use of various agencies. They declare that the desired sum shall be realized out of the taxable estates in the county of New York. They constitute the Board of Supervisors their agents, to levy the tax and raise the money. They make the comptroller their agent, for the payment of the money to Devlin. No duty is imposed upon the corporation, nor can any obligation upon their part to pay this money to Devlin be fairly implied from the circumstances of the case.

b. The mere fact that one party has in his possession money due to or belonging to another, has never been regarded as a sufficient foundation for an action for money had and received. There must be either some agreement or promise to pay the money, or some positive duty imposed upon the party having possession of the money to pay the same. (Bigelow *a.* Davis, 16 *Barb.*, 561, and cases cited.)

a. The action is without precedent. If the plaintiffs are entitled to the amount claimed, their remedy is to compel the comptroller by mandamus to obey the legislative command and direction.

The experiment of an action was doubtless resorted to in order that, if successful, they might increase the gift of the Legislature by the addition of interest.

L. B. Woodruff, for the respondents.—I. In the discharge of his duty, the chamberlain, Mr. Devlin, was subjected to the expense and liabilities stated in the complaint.

The fact that they were incurred, their necessity, and that they were worth the sum stated, is admitted by the demurrer.

His appointment and acceptance of the office, his official oath and bond, bound him to the city for the due performance of his duties; and the protection of the city, in the department of finance, was devolved upon him as the legal guardian of the city treasury.

1. The corporation could not, in its own name, have maintained the summary proceedings to compel the delivery of the

books and papers to the new chamberlain; and yet they were indispensable to the proper conduct of affairs and the due preservation of the records of the office. By the statute, the successor to the office is the only party authorized to demand possession of the books and papers, or to take proceedings to recover the same. (1 *Rev. Stat.* [125, § 51], 5th ed., 417, § 63.)

2. By the act of 1860 (*Laws of* 1860, 953), the chamberlain is declared "the custodian" of the funds of the city, and on his designation the Broadway Bank became the legal depository of such funds.

On the refusal of the Park Bank to transfer the funds, it became the duty of the "legal custodian" of the money to institute proceedings to compel the transfer. The expenses and liabilities incurred by the chamberlain, therefore, made the city, for whose benefit they were incurred, debtor to him. They were incurred by him in the due discharge of official duty. He would have been derelict, if he had neglected the performance of the duty. The duty being upon him, it being a duty to be performed in behalf of, and for the benefit of the city, a request by the defendants, to perform it, is implied. A servant of the corporation has authority to perform his duty, and is entitled to be indemnified against loss or expense. Public officers have an implied authority, as incident to their office, to bring all suits which the proper and faithful discharge of their official duties requires. (Overseers *a.* Overseers, 18 *Johns.*, 407; Todd *a.* Birdsall, 1 *Cow.*, 260, notes p. 261–4, and cases cited; Jansen *a.* Ostrander, *Ib.*, 670; Palmer *a.* Vandenburgh, 3 *Wend.*, 193; Armine *a.* Spencer, 4 *Ib.*, 407; Supervisors of Galway *a.* Stimson, 4 *Hill*, 136; see also Silver *a.* Cumings, 7 *Wend.*, 181; Avery *a.* Slack, 19 *Ib.*, 50; Cornell *a.* Town of Guilford, 1 *Den.*, 515.) *A fortiori*, this is true of the employment of means which a statute has provided.

Such officers are therefore entitled to indemnity for expenses incurred by them in their resort to legal measures which become necessary to the due performance of official duty. This follows from the analogous rule, that officers sued for acts done by them as such in the course of their agency, and pursuant to their authority, are entitled to be reimbursed the expenses of their defence. (Powell *a.* Trustees of Newburg, 19 *Johns.*,

284; 11 *Ib.*, 439; 1 *Day*, 522; and 8 *T. R.*, 308, 610; 1 *Binn.*, 441.)

Public offices in this State have not the character of grants; they are agencies. It is upon that principle that it is held that public officers have no vested right to the unearned emoluments of office. (Connor *a.* The Mayor, &c., 5 *N. Y.* (1 *Seld.*), 285; S. C., 2 *Sandf.*, 355; Philips *a.* The Mayor, 1 *Hilt.*, 483.)

II. That provision of the charter which provides that no expenses shall be incurred by any of the departments, unless a previous appropriation therefor has been made, has no application to this subject.

1. That relates to their power to make engagements and incur debts on behalf of the city. The chamberlain did not attempt to do any thing more than discharge his own duty, and he became himself liable for the expenses. It is the implied obligation of the city to indemnify him, upon which we here insist. That is an obligation resulting from the relation; it is implied by law, and is not a contract made by the officer on behalf of the city.

2. If there was originally any force in this suggestion, the act of 1861 removes it. That act gave legislative sanction to the acts of Devlin, and left the obligation to indemnify him perfect; especially, since it at the same time provided the city with the money wherewith to make such indemnity.

A contract which is invalid only because so declared by a statute founded in public policy, becomes valid if the invalidating statute is repealed. (Washburn *a.* Franklin, 13 *Abbotts' Pr.*, 140; Central Bank *a.* Empire Stone Dressing Co., 26 *Barb.*, 23; Curtis *a.* Leavitt, 15 *N. Y.*, 9; People *a.* Livingston, 6 *Wend.*, 256; Tucker *a.* Trustees of Rochester, 7 *Ib.*, 254.)

III. The defendants are liable, not only because the claim is for an indebtedness by the defendants upon the grounds above stated, but also because the money has been raised "on account of the corporation of the city of New York," for a special designated purpose (viz., payment to Mr. Devlin), and has been paid to the defendants for that purpose, received by them, and still held.

The defendants have, therefore, received so much money to the use of Devlin, and are legally liable therefor. The liability

to pay it over was a direct and immediate consequence of their receiving the money for the purpose, to which the statute directed its appropriation.

An action of assumpsit could, therefore, be maintained upon an implied promise founded on such legal liability. (Chancellor in Van Hook *a.* Whitlock, 3 *Paige*, 409.)

IV. The act was binding on the city. Similar legislation has been the common usage. Twenty-five years will suffice for the purpose of this examination. (*Laws of* 1836, 201; *Id.*, 1837, 99, 321; *Id.*, 1847, 172; *Id.*, 1848, 46; *Id.*, 1849, 545; *Id.*, 1858, 490; *Id.*, 1859, 1113–14, 1124, 1126; *Id.*, 1862, 751; *Id.*, 1863, 168.)

But there is no real doubt of their validity. The Legislature has power to levy a tax upon the taxable property of a town, and to appropriate it to the payment of a claim of an individual against the town. (Town of Guilford *a.* Supervisors of Chenango, 13 *N. Y.*, 143; S. C., 18 *Barb.*, 615, 620, 632–4, 643–4.) This is true, even though the claim of the individual was not theretofore recoverable by action against the town. *Ib.* (In Cornell *a.* Guilford, 1 *Den.*, 510, the individual had failed to recover.) (The People *a.* The Mayor, &c., of Brooklyn, 4 *Comst.*, 423; Thomas *a.* Leland, 24 *Wend.*, 65; Brewster *a.* City of Syracuse, 19 *N. Y.*, 116.)

If the party to whom the money is to be paid could not recover it when raised, the legislative will, expressed in a valid form, could be defeated.

V. Whether a mandamus would issue or would not issue, addressed to the subordinate officer, is not the question. The general rule is, no doubt, that where an action will lie for the money, a mandamus will not be issued to compel its payment. The defendant will be permitted to contest the claim in the ordinary mode of determining controversies.

Yet there are cases in which, although an action would lie against a corporation, yet where the right is fully established and recognized, and some ministerial act only remains to be done, a mandamus will issue to compel a subordinate officer to perform the act. (See The People *a.* Flagg, 16 *Barb.*, 503; The People *a.* Haws, 21 *How. Pr.*, 178; The People *a.* Flagg, 17 *N. Y.*, 584.)

The liability of the corporation being established, an action

cannot be defeated by showing that the plaintiffs might resort to another remedy.

The true argument is applicable to an attempt by the plaintiffs to obtain a mandamus. On such an application the general rule above mentioned could be invoked—viz., if a liability be shown for which an action would lie, the motion must be denied.

Here the money has been collected and paid to the defendants. They refused to pay it; they retain it in their treasury, over which they have legal control. As against them, the plaintiffs have a right to have the money; and if so, an action will lie for it.

By the Court.—Brady, J.—The question upon which there is a difference of opinion between Judge Daly and myself, is whether an action can be maintained against the defendants, assuming that they have in their custody, and under their control, the money specially appropriated by the Legislature of this State for the payment of the plaintiffs' demand.

The claim for services rendered by the plaintiffs to the city chamberlain, the plaintiffs regarded as a proper charge against the city of New York; and the tax-levy for the year 1861 being then before the Legislature, they presented their bill to that body, and the result was a provision in the act of 1861, passed April 17, by which the supervisors were empowered and required to cause to be raised by tax, "on account of the corporation of the city of New York," the sum claimed as before mentioned, which was to be paid to the chamberlain, and in whose favor the comptroller was authorized and directed to draw his warrant for that sum. The sum was raised in the manner prescribed, and paid into the city treasury.

The city chamberlain is an officer of the city, as his title imports, and the chief officer of a bureau in the department of finance (*Charter of* 1857, §§ 21, 22), for the reception of all the moneys paid into the treasury of the city, and for the payment of moneys on the warrants drawn by the comptroller, and countersigned by the mayor and clerk of the Common Council (*Charter of* 1857, § 22). He is the custodian of the funds belonging to the city of New York (*Laws of* 1860, 953), and the struggle for such funds, and the books, and papers, and vouchers

connected with the bureau, was one in the result of which the defendants were interested. The expenses of the litigation, which the newly appointed chamberlain was obliged to incur, were, therefore, though pertinent to the assumption and discharge of his duties, indirectly advantageous to the defendants, who had exercised the power of removal and appointment.

Whether this be so or not, however, is not material to the disposition of the question under consideration. The Legislature determined that the charge was a proper one against the city, as they had done before in an analogous case (see *Laws of* 1858, 490), and they directed the supervisors to raise the money by tax, "on account of the defendants," to pay it. The Legislature, having recognized the validity, or established the validity of the claim against the city, the right to do which is not to be questioned (Town of Guilford *a.* Supervisors of Chenango, 13 *N. Y.*, 143), the liability of the defendants was admitted and determined.

The Legislature went further, however. They provided by what means and in what manner the money should be raised to meet the obligation, and directed the comptroller to draw his warrant for the sum. There can be no doubt that it was wholly unnecessary to insert the direction to the comptroller to draw the warrant. The claim having been established, it became his duty, under section 22 of the charter of 1857, "to settle and adjust it," and the direction cannot be regarded *per se* as a special enactment, taking the particular sum under consideration from the general duties which the comptroller is required by law to discharge, under the charter, in reference to claims against the city. The result would be precisely the same, whether the act contained the specific direction or not, there being nothing in the language of the act, or in its general purpose or design, indicating an intention to make the claim of the chamberlain an exception to the general or admitted obligations of the defendants, or the comptroller a special depository or custodian of the fund to meet it. On the contrary, the act of 1861 authorizes the supervisors to raise, on account of the corporation, a sum in gross for certain purposes; and the purposes then being set out in detail, the sum due to the chamberlain, and by him assigned to the plaintiffs, appears among

them. The warrant contemplated by the act to be drawn by the comptroller would not be good, unless countersigned by the mayor and clerk of the Common Council, as provided by the charter of 1857, there being nothing in the direction relied upon excepting it from the provisions of that law; a circumstance which bears directly upon the proposition, that the Legislature intended to and did create a liability on the part of the defendants, which they furnished the means to discharge. But the warrant being drawn, would be drawn against the funds of the defendants, in the treasury there deposited, under the general appropriation which embraced the claim in question, and not against any fund specifically deposited with the comptroller.

The provisions of the act of 1861 contain directions to the defendants, in terms, to appropriate, of the money to be raised by tax, an amount sufficient to pay the sum due to the chamberlain; and that established their liability to him or his assignees. The direction expressly contained to the comptroller, was the mere declaration of a legal duty imposed by law upon that officer, in reference to the funds and debt of the defendants; which was unnecessary, either to accomplish the plaintiffs' right to recover, or the defendants' obligation to pay, and did not create a special relation between the chamberlain and the comptroller. For these reasons, without considering this matter further, I think it clear that the defendants were, by the act of 1861, rendered liable to the plaintiffs to pay the sum demanded, and, being liable, this action can be maintained; that the liability established is not controlled in any way by the direction to the comptroller to draw his warrant, that being his duty in reference to all claims against the city, and there being nothing in the act of 1861 isolating the sum due to the plaintiffs, as assignees of Devlin, from the general rules of law governing the remedy against the defendants upon claims established.

The judgment should be affirmed.

DALY, F. J. (dissenting).—By the 22d section of the amended Charter of 1857 (*Laws of* 1857, 879), the chamberlain is the chief officer of one of the bureaux of the department of finance; and by the 26th section, the law department has the charge

and conduct of all the law business, both of the corporation and of the departments. If the corporation are chargeable with the expense of proceedings instituted by any officer of the departments to obtain possession of the city property belonging to his department, then it is, under the charter, law business of the corporation, or of the particular department, and must be placed in the charge of, and be conducted by, the appropriate officer of the law department. If the officer employs other legal aid to conduct the proceeding, he does so at his own cost, and has no claim against the city to be indemnified for expenses so incurred. It was held in Powell *a.* The Trustees of Newburg (19 *Johns.*, 284), that the trustees of an incorporated village, who had incurred expense in defending themselves in a suit brought against them for an act done in the faithful discharge of their duty, could maintain an action against the corporation to recover the expense thus incurred, upon the ground that the principal is liable for the expense necessarily incurred by an agent in managing the principal's affairs or in protecting his interests; but if the protection of the interests of the principal involves the institution or the defence of a lawsuit, and the principal has designated who in that event is to conduct and manage it, the agent would be acting wrongfully in employing anybody else, and would not necessarily, in such a case, have the legal right to insist that the principal should repay what the agent disbursed to the person he saw fit to employ. In the present case, a law department has been created by an act of the Legislature for conducting all the law business relating to the corporation, or any of the departments, the officers of which receive compensation in the form of fixed salaries, which are paid to them out of the city treasury for attending to this duty; and such being the case, it would be defeating the intention of the Legislature to hold that every officer connected with the city government might employ private counsel in all matters arising in connection with his office, and impose upon the city the payment of the additional expense thus incurred.

It remains, then, but to consider whether the act of the Legislature of April 17, 1861, coupled with the refusal of the comptroller to comply with the provisions of that act, gives the plaintiff a right of action against the corporation. In my judg-

ment, it does not. There is no doubt of the power of the Legislature to pass such an act (Town of Guilford *a.* Supervisors of Chenango Co., 13 *N. Y.*, 143), but by its passage they have imposed no duty upon the corporation as such. They have directed that the supervisors of the county should raise by tax the sum of $22,765.67, which shall be paid to the chamberlain to reimburse him for expenses incurred by him in procuring the transfer of the books, securities, and funds of his office from his predecessor, and in defending and establishing the title to the office; and they have directed the mode in which this sum shall be paid, by authorizing and directing the comptroller to draw his warrant for the amount in favor of the chamberlain. The supervisors have complied with the requisitions of the act. The amount has been raised by tax, and is in the city treasury, but the comptroller has refused to draw his warrant for it in favor of the chamberlain. The act was one which he was specifically empowered and directed by the Legislature to do, and I do not see, because he refuses to do it, that an action can be maintained against the corporation for the recovery of the amount. The corporation have in this matter no authority over him. He is neither appointed by nor removable by the corporation; and though connected with it in the administration of the city government, he is, in a certain sense, an independent officer, elected by the people. "No case has been cited," says COWEN, J., in Martin *a.* The Mayor of Brooklyn (1 *Hill*, 551), "wherein it has been holden that municipal corporations are liable for omissions of duty specifically imposed by statute on one of their officers. In this respect," he says, "the latter are *quasi* civil officers of the government, though appointed by the corporation. The relation of master and servant does not exist between the corporation and officer." And in the elaborate brief submitted by the very able counsel who argued the case for the plaintiff, no authority has been cited showing that, under circumstances like this, an action would lie against a municipal corporation. Where a statute imposes, as in this case, a duty upon a public officer, he is responsible for the neglect of that duty to any person sustaining damage, and the plaintiff's remedy is either by an action against the comptroller, or by a proceeding to compel him to perform the duty enjoined by the Legislature. (Barry *a.*

Arnould, 10 *A. & E.*, 646; Lacon *a.* Hooper, 6 *T. R.*, 224; *Grant on Corporations*, 384; *Tapping on Mandamus*, 176.)

The judgment should have been for the defendant, on the demurrer.

Judgment affirmed.

ANSEN *a.* TUSKA.

New York Superior Court; General Term, June, 1863.

DISCOVERY AND INSPECTION.

The court have no power, on motion, to compel a party to an action to submit articles which are the subject thereof, and are neither books, documents, nor evidence of themselves, to be inspected by third persons, in order to enable them thereby to qualify themselves to testify as experts, in the action, for the party applying, as to the mere quality of such articles.

This was an appeal from an order denying a motion for a discovery.

The plaintiffs, Louis Ansen and others, brought this action upon an alleged breach of a contract by the defendant, Philip H. Tuska, to purchase, by sample, a quantity of merchandise, which the defendant had refused on a tender of it to accept, on the ground that it did not correspond with the sample.

The defendant moved, on affidavits that an inspection of such articles by third persons was necessary to his defence, for an order compelling the plaintiffs to produce the goods at a time and place to be fixed by the court, to be inspected by persons to be selected by him, to enable them to testify as experts as to the correspondence of such articles with the samples.

The motion was heard at special term before Mr. Justice ROBERTSON, who denied it; and from the order entered on his decision the defendant appealed.

By the Court.*—Robertson, J.—I am induced by a fuller examination and more full reflection to adhere to my views first expressed in this case at special term. I was then startled with the novelty of the application, and could find no principle or authority to warrant granting it. It may be morally obligatory on either party having in his possession exclusively, information beneficial to the other party in the litigation between them, to disclose it to him; but the duty is one of imperfect obligation, not capable of practical definition or legal enforcement. Of course, the court has means at its disposal for such enforcement, if it were proper. Assuming that it clearly appears *prima facie* that a party seeking the aid of the court to enforce such disclosure, has a case to sustain, it will always be difficult to determine that the party applying is without any other means of accomplishing the desired results but the information sought. It would not be safe to allow the party applying, to be the sole judge of whether a disclosure or inspection of certain articles were indispensable for the purposes of doing justice, and his assertion to that effect to be conclusive.

The present is, however, not strictly an application for discovery; that is confined to an examination of adverse parties as witnesses, and the production of books, papers, documents, and entries. In such cases, the testimony of such parties becomes available directly as evidence in the action, and copies taken or furnished of such writings may be produced in the absence of the originals. But it is contended that the principle which allows the compulsion of such discovery, is equally applicable to a compulsory inspection of articles of merchandise which form the subject-matter of an action, by third persons, in order to enable them to speak more intelligently and clearly, and with less loss of time on the trial, if their entire qualification to act as witnesses at all did not depend upon it.

It is very clear that such relief could not, under the former division of the jurisdictions of courts, have formed the subject of an action in equity, and there is no authority or principle to be found to sustain it. A final decree in an action to compel a party to produce, for the inspection of his adversary's pro-

* Present, Robertson, White, and Barbour, JJ.

spective witnesses, the subject of controversy, would be entirely novel. If such power exists anywhere, it must be in the exercise of equitable jurisdiction by common-law courts. The only exception in which that has been exercised, has been by the deposit of deeds (Jackson *a.* Jones, 3 *Cow.*, 17), and notes (Brush *a.* Gibbons, *Ib.*, 18, n.) charged with being forgeries. An instrument required to be filed in a proper office (People *a.* Vail, 1 *Cow.*, 589; S. C., 2 *Ib.*, 623) by a stranger, is hardly an exception.

In the present case the defendant refused to receive the merchandise sold, the price of which is now sued for, because it did not correspond with the sample by which it was sold; he therefore naturally may be presumed to have furnished himself, at the time it was tendered, with the means of proving such want of correspondence. The plaintiff is bound, in order to make out his case *prima facie*, to establish that the goods were of the kind sold; the mere outward appearance of a few of such articles would not be sufficient; he must establish their thorough compliance with such description. If the defendant had no means of ascertaining the compliance of such article when tendered with such terms of their description, he should have taken them into his possession and returned them, as he had a right to do, as soon as with reasonable diligence he had ascertained, and so thoroughly as to be capable of proving it, that the articles did not correspond with the samples. By rejecting them at once, without such full examination, he incurred by his own negligence whatever risk there was of not being able to prove conclusively the inferiority of the article, and he is not entitled now to call upon this court to exercise an unprecedented power to furnish him with an opportunity for such examination, in order to repair the consequences of such negligence.

The order appealed from must be affirmed, with costs.

CASE OF THE TWELVE COMMITMENTS.

N. Y. Common Pleas; before Hon. Charles P. Daly, F. J., October, 1865.

DISORDERLY CONDUCT.—CONVICTION AND COMMITMENT.

The distinction between a commitment under the statutes relating to the city of New York, for disorderly conduct, and under the Revised Statutes, for being a disorderly person, stated.

Upon a conviction for disorderly conduct, the making and filing of a record, is not necessary.*

The act of 1859, empowering the magistrate to impose a fine of not more than $10, or to commit to the city prison for not more than ten days (*Laws of* 1859, 1129, ch. 491, § 5), does not take away the power to require security for good behavior for any period not exceeding twelve months, and commit the offender for such period in default of compliance.†

The provision of the act of 1860, declaring certain acts to be disorderly conduct (*Laws of* 1860, 1013, ch. 508, § 20), does not repeal or supersede that of the act of 1833, which provides that any conduct which, in the opinion of the magistrate, tends to a breach of the peace, may be punished as disorderly conduct.

It is not necessary that a commitment for disorderly conduct should set forth the particular act complained of.

If the magistrate acted erroneously, or upon insufficient evidence, the remedy is not by *habeas corpus*, but by certiorari.

An order of transfer of a prisoner from the city prison to the workhouse must be made by the Board of Public Charities and Correction; but if by its terms it purports to be their act, an authentication by the signature of one of the commissioners is sufficient, at least when questioned upon *habeas corpus*.

A commitment for disorderly conduct until the party shall find security for his good behavior, without qualification as to time, is void. It should be limited to a specified period not exceeding twelve months.

The writ of *habeas corpus*, issued to inquire into the cause of an imprisonment, is in the nature of a writ of error; and when allowed and heard by an officer out of court (under the Revised Statutes), the officer is deemed a court within the meaning of the act of 1864, which forbids certain prisoners to be discharged before the expiration of sentence, except upon review by a court of superior jurisdiction to the magistrate making the commitment.

Where an authority is created by statute, with power to fine or imprison, the officer, person, or body invested therewith is, for that purpose, deemed a court.

Writs of *habeas corpus* were issued at the instance of Helena Miller and eleven other persons, imprisoned upon Blackwell's

* See, also, Williamson's Case, *Post*, 413.

† See, also, Ann Doyle's Case, *Ante*, 269.

Island, upon commitments for disorderly conduct in the city of New York.

DALY, F. J.—The parties in the above cases have been brought before me upon writs of *habeas corpus*, and the authority upon which they are held upon writs of certiorari. They have been severally committed by police justices for disorderly conduct, upon failing to give security for their good behavior, to the city prison, and from thence have been transferred to the workhouse upon Blackwell's Island. Their discharge is sought upon the ground that the original commitments, in every case, are void, and upon the further ground, in some of the cases, that the transfers to the workhouse were not in the mode prescribed by law.

As many laws have been passed in respect to those summary convictions, and as a great deal of uncertainty prevails as to the correct mode of procedure under them, it will be necessary for me to review the various statutory enactments, that I may pass intelligibly upon the questions raised.

In that portion of the Revised Statutes relating to the internal police of the State (1 *Rev. Stat.*, ch. 20, part I., titles 2 and 5), an enumeration is made of two classes of offenders: 1st, vagrants; 2d, disorderly persons. Under the head of vagrants are embraced: 1st, idle persons, living without employment, and having no visible means of support; 2d, beggars; 3d, persons wandering abroad, and sleeping in the open air, or other specified places. And disorderly persons are substantially designated—as: 1st, Those who abandon their wives and families; 2d, prostitutes; 3d, fortune-tellers; 4th, mountebanks; 5th, common showmen; 6th, gamblers; and 7th, keepers of bawdy-houses.

The first class, vagrants, upon conviction before a magistrate, may be committed to the poorhouse for six months, or, if improper persons to be sent there, may be sent to the county jail for sixty days. The second class, disorderly persons, upon conviction, may be required by the magistrate to give security for their good behavior for a year, and, failing to do so, may be committed to the common jail until they find such security, or are discharged by law. Upon the conviction of a vagrant, a record of the conviction must be made up by the magistrate,

and filed in the county clerk's office; and on the commitment of a disorderly person, upon failing to give security, a record must also be made up in the same way and filed.

In 1833, an act was passed for the regulation of the criminal courts of this city (*Laws of* 1833, 9, ch. 11), which, among other things, embraced an enumeration of the class known as vagrants, which is more extensive than that contained in the Revised Statutes, and an addition was made to the class known as disorderly persons. This act, which was limited to the city of New York, authorized the mayor, recorder, or any police justice of the city, to commit vagrants, who are not notorious offenders, to the almshouse for six months at hard labor; or, if not fit persons to be sent there, then to the penitentiary for the same period. It provided for the commitment of disorderly persons in the same manner as in the Revised Statutes, and in both cases required the filing of a record of the conviction.

This act made provision also for what is denominated in the act disorderly conduct, which by one section (§ 5) is the riding or driving of a horse through the public streets at a greater rate of speed than five miles an hour; and in another section (§ 8) is declared to be such disorderly conduct as, in the opinion of the magistrate, tends to a breach of the peace. For the offence of improper driving, the magistrate is authorized to impose a fine of $10, and if it is not paid, to commit the offender to the city prison until it is paid, but not for a longer period than ten days; and for the offence of disorderly conduct tending to a breach of the peace, he is empowered to require the offender to give security for his or her good behavior for a period not exceeding twelve months. The statute is silent as to what the magistrate is to do, if the security is not given; but though not expressed, the intention is manifestly implied that the offender is to be committed until he gives it, or until the expiration of the period for which he was required to give it; and such, since the passage of the act, has been the course of procedure under it.

The disorderly conduct here referred to is distinguishable and different from those acts which will constitue a disorderly person or a vagrant, as defined in this statute and by the Revised Statutes. In common parlance, a person guilty of disorderly conduct may be said to be a disorderly person; but

we have here to do with statutes that have carefully defined what is to be understood by the term "a disorderly person," and which have distinguished the offence of disorderly conduct as simply the offence of improper driving, or such conduct as, in the opinion of the magistrate, tends to a breach of the peace; and it has been the failure to observe this distinction, and the confounding of one term with the other, that have led to a great deal of the practical difficulty attending the administration of this branch of our criminal law. The term disorderly conduct, as distinguishing an offence different from that which will constitute a disorderly person, was used in our statutes long before the passage of this local act of 1833, or the adoption of the Revised Statutes (*Laws of* 1816, 171, 172, § 2; 1 *Rev. Laws of* 1813, 114; 2 *Ib.*, 354); and in addition to what has been above pointed out, there are other features which serve to distinguish the one from the other. The act of 1833 requires a record to be filed upon the commitment of a disorderly person who fails to give the requisite security (§ 7); but it makes no such provision in respect to disorderly conduct (§ 8). In the case of disorderly conduct, moreover, the magistrate may require security for the offender's good behavior, for any period he may think proper to designate, not exceeding twelve months. He may take it for a week, or for a month, or for any time within the statutory limit; whereas, in the case of a disorderly person, he must take it for a year, and not for any lesser period. There are, therefore, under the statutes regulating their summary conviction before a magistrate without a jury, three classes: 1st, vagrants; 2d, disorderly persons; and 3d, persons guilty of disorderly conduct,—each of which is distinguishable from the other, and in each the course of procedure is different. All the cases now before me are commitments for disorderly conduct; and in passing upon the questions that have been raised as to the validity of these commitments, I shall examine only such statutory provisions as, in my judgment, relate exclusively to this class of convictions.

The first objection is, that no record has been filed. It is not necessary. The fact that the statute of 1833 makes provision for the filing of a record upon the commitment of a vagrant or of a disorderly person, and makes no such provision in relation to convictions for disorderly conduct, must be taken

as an expression of the legislative intention, that this class of convictions were intended to be of a more summary character, in which the formality of a record was to be dispensed with. They have been uniformly so regarded; and during the thirty-two years that have elapsed since the passage of the act of 1833, it has never been the practice to make up and file records of conviction in such cases.

In 1859, an act was passed in relation to police justices in this city (*Laws of* 1859, 1129, ch. 491), by which it was provided (§ 5) that in all cases of arrest for intoxication or disorderly conduct, the police justice, in addition to holding the party to bail for good behavior, should have power to impose a fine to the extent of $10, or to commit to the city prison for a period not exceeding ten days, each day of imprisonment to be taken as a liquidation of one dollar of the fine.

It is insisted that since the passage of this act there can be no commitment for a greater period than ten days—that all the magistrate can do is to require the party to give security for good behavior; and if it is not given, to impose a fine of $10 or less; and if that is not paid, commit to the city prison for ten days or less. But this, by the express word of the statute, is a power given in addition to that which authorized the magistrate to require security for the party's good behavior for a period not exceeding twelve months; and the use of the words "in addition" is a plain indication of the intention that the previous power was to continue. As I interpret the statute, therefore, the justice may, as he could do before, require the party to give security for any period not exceeding twelve months, and commit him if he fails to give it; or he may impose a fine to the extent of $10, and if it is not paid, commit the party for a number of days corresponding with the amount of the fine. As a large number of those who are arrested for disorderly conduct are composed of a class generally unable to give security, the discretion is certainly a very large one which allows a magistrate to commit them to prison for twelve months, when for much graver offences the Court of Special Sessions can sentence an offender for no longer a period than six months; and this becomes the more serious when it is considered that the right to commit for disorderly conduct is not expressly given, but merely implied. In the commitment of

vagrant or disorderly persons, moreover, the magistrate is required to distinguish between those who should be sent to the almshouse at hard labor, at present known as the workhouse, and those who should be sent to the penitentiary. In the commitment of disorderly persons, not only is the filing of a record of conviction directed, but the keeper of the jail is required (1 *Rev. Stat.*, 639) to return to the next court of General Sessions a list of all persons so committed and in his custody, with a statement of their offences, the names of the justices committing them, and the term during which they have been in prison; and the court is directed to inquire into the circumstances, to hear any proof that may be offered, to examine the record of conviction, and in its discretion may either discharge the offender or order him to be left in jail for a period of six months. But no such supervisory power exists in commitments for disorderly conduct; nor until 1857 was there any means by which a person so committed could review the decision of the justice, or be discharged from the commitment, except by giving security, which, as a general rule, it is not in the power of this class of persons to obtain. The power which the magistrate and the Commissioners of Public Charities and Correction have, to discharge from the workhouse or penitentiary, applies only to the case of vagrant and disorderly persons, and not to those convicted merely of disorderly conduct. (*Laws of* 1853, 353, ch. 183; *Laws of* 1855, 451, ch. 268; *Laws of* 1860, 1008, ch. 508, § 5.)

The strange anomaly is therefore presented, that the former, who are guilty of much graver offences, have their conviction reviewed at the next term of the Court of General Sessions; that they cannot, in any event, be imprisoned for a longer period than six months, and may be discharged by the Court of Sessions, or at any time during their imprisonment by an order of two of the Commissioners of Public Charities and Correction, with the approval of the magistrate that committed them; while the latter, whose offences are of a lighter degree, may be imprisoned for twelve months, and cannot be discharged unless they give security. An act was passed in 1857 (*Laws of* 1857, vol. 2, 708), amended in 1859 (*Laws of* 1859, 794), by which a writ of certiorari to the Court of Sessions to review a conviction in a police court may be allowed by a justice of the Supreme

Court; but until the passage of this act there was no means by which any error, mistake, or injustice in a commitment for disorderly conduct could be interfered with by any officer or tribunal; and the committing magistrate was clothed with a power which, whether rightly or wrongly exercised, was beyond review or remedy. Our statutes, in this particular, are in a state certainly calling for amendment; and it is to be hoped that the consideration of this subject will be brought to the attention of the Legislature.

By an act passed in 1860 in relation to the police and courts in this city (*Laws of* 1860, 1013, ch. 508), it was provided (§ 20) that every person in this city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place in said city and county commit any of the following offences, that is to say:

"1st. Every person who shall suffer to be at large any unmuzzled, ferocious, or vicious dog.

"2d. Every common prostitute or night-walker, loitering or or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers-by.

"3d. Every person who shall use any threatening, abusive, or insulting behavior, with an intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned."

It is claimed that this is a legislative exposition of what is meant by disorderly conduct; that it defines and limits the nature of the offence, and that every commitment must show upon its face that the offender was found guilty of some one of the acts above specified.

But this statute cannot be taken as repealing those parts of the act of 1833 providing for the punishment of disorderly conduct. It declares that the cases specified shall constitute disorderly conduct; but neither in its terms nor by implication does it limit it to such cases. It is not in conflict nor in any way inconsistent with the pre-existing act of 1833, by the provisions of which any conduct is disorderly which, in the opinion of the magistrate, tends to a breach of the peace. In respect to the acts or offences particularized, it leaves nothing to the discretion or opinion of the magistrate, if the fact is proved; but does not go beyond that. It is not desirable that it should, for

there are many acts which tend to produce a breach of the peace that it would be difficult to bring within any statutory positive definition. The discretion with which the magistrate is clothed by the act of 1833, to require security for good behavior when the conduct of the offender has been such as, in the opinion of the magistrate, has a tendency to lead to a breach of the peace, is a salutary one. It is indispensable in a great metropolis like this, to secure the preservation of good order; and it is not to be assumed that the Legislature meant to take away what was so essential to its preservation, unless that intention is unmistakably expressed.

The next objection is, that none of the commitments, except in one case, specify any act that was done, tending to a breach of the peace. It is insisted that the commitment should set forth, either that the party was convicted of some one of the acts specified in the amendatory statute of 1859; or some act or acts should be stated which, in the opinion of the magistrate, had a tendency to produce a breach of the peace.

This objection is not tenable. Where the criminal process under which the party is imprisoned is returned, as in these cases, in answer to the writ of *habeas corpus*, all that the officer granting the writ can do is, to examine the process to see if the officer or court whence it emanated had jurisdiction of the subject-matter; and if that appears upon the face of the process, the prisoner must be remanded to the custody from which he was taken. The officer making these commitments may have acted upon insufficient evidence, or without any evidence at all; but that is not a matter which can be inquired into upon *habeas corpus*. (The People *a.* Cassels, 5 *Hill*, 168; Bennac *a.* The People, 4 *Barb.*, 31; The People *a.* McLeod, 25 *Wend.*, 483; 1 *Hill*, 377; In the Matter of Clarke, 9 *Wend.*, 483; In the Matter of Prime, 1 *Barb., S. C.*, 340; Case of the Sheriff of Middlesex, 11 *Ad. & Ellis*, 273.) "A warrant," says Justice WILLARD, in Bennac *a.* The People, *supra*, "issued upon the conviction of a party as a disorderly person, is not required to recite any fact but such conviction;" and in the learned note of the late Mr. HILL upon the nature of the writ of *habeas corpus* (3 *Hill, Appendix*, 658, notes 30, 31), he says, after a citation of the authorities: "Neither this [the English] nor our own statute was intended to authorize an inquiry into the validity of writs,

warrants, or other process, further than to ascertain whether they will protect the party suing them out, or the officer serving or executing them. . . . If the object be to impeach it as irregular, or as founded on an erroneous or irregular judgment, decree, or conviction, you can no more inquire of such things collaterally by *habeas corpus*, than by action or indictment. . . . Error, irregularity, or want of form, is no objection. . . . Where the process is sufficient to protect the party and officer, the imprisonment is lawful, and must be relieved against by direct proceedings,—*e. g.*, a writ of error, certiorari," &c.

The commitments in these cases declare that the prisoner was charged before the magistrate, upon the oath of a witness who is named, with such disorderly conduct as, in the opinion of the magistrate, tends to a breach of the peace; that the prisoner was required to give security for his good behavior; that he failed to do so; and closes with the order that he be committed to the city prison for a period named, which in no one of the cases is greater than six months, or until he find security. This is amply sufficient to show that the police justice in each case acted in a matter of which he had jurisdiction, and that he had authority to do what he did. If he acted erroneously or upon insufficient evidence, the prisoner's remedy is to procure the allowance of a writ of certiorari to the Court of Sessions to review the justice's judgment under the amendatory act of 1859. (*Laws of* 1859, 794.)

The next objection is to the mode by which the prisoners were transferred from the city prison to the workhouse on Blackwell's Island. The act abolishing the almshouse and creating the Department of Public Charities and Correction (*Laws of* 1860, 1026, ch. 510), authorizes the board of commissioners to transfer and commit from the city prison to the workhouse, vagrants, disorderly persons and persons committed for crime. There might be some doubt whether persons committed to the city prison for disorderly conduct would be included in either of the classes above specified; but that doubt is set at rest by the passage of the act of 1864 (*Laws of* 1864, 1342, ch. 586), which is not only a legislative recognition that such was the intention, but an act designating the time at which the transfers may be made in such cases. This disposes of the first objection made upon this ground.

In some of the cases before me, the order for the transfer is signed merely by one of the commissioners, and there is nothing upon the face of the paper to denote that it was done by order of the board. This is not sufficient. The power is given by the statute to this board, and not to any one of the commissioners; and to warrant the transfer, it must at least appear that the board acted in the premises. In the other cases, the order for the transfer purports upon its face to be made by the direction of the board, and is authenticated by the signature of one of the commissioners. This is, in my judgment, sufficient in answer to a writ of *habeas corpus*.

In some cases, the party is committed until he finds security in a certain sum for his good behavior. Such a commitment is void, as the justice can require the party only to give security for some period, not exceeding twelve months; and under a commitment like this, the party, if he could not find security, would be detained beyond twelve months. It is, in such an event, equivalent, in fact, to perpetual imprisonment.

In other cases, the commitments are defective, as they fix no positive term of imprisonment, other than that it is not to exceed six months. They do not declare for what period the party was required to give security for his good behavior, but simply direct that he shall be imprisoned for a period not exceeding six months.

The last objection is, that a judge upon *habeas corpus* has no power to discharge a commitment for disorderly conduct, in any case or for any cause.

By an act passed in 1864 (*Laws of* 1864, 1342, ch. 586), it is declared that no person committed to the said city prison or the workhouse for drunkenness or disorderly conduct, shall be released or discharged from confinement before the expiration of the term for which he or she shall be committed, except upon reversal of judgment upon appeal, or review by a court of superior jurisdiction to the magistrate making the commitment, without a written order, directing such discharge, be made and signed by the committing magistrate and one of the Commissioners of Public Charities and Correction.

It is not to be assumed that the Legislature intended to take away the privilege of the writ of *habeas corpus*, where the citizen is deprived of his liberty by an officer acting totally

without jurisdiction, unless it is clear that such was the intention; and I do not think that such was the design of this act. A restrictive act of an analogous character was passed in 1855 (*Davies' Laws* relative to the city of New York, 1194), forbidding the discharge of vagrants from the penitentiary or workhouse, unless upon a writ of *habeas corpus* or certiorari, except by an order of the governors of the almshouse; and by an act passed in 1860 (*Valentine's Laws* relating to the city of New York, 606), it was provided that disorderly persons should not be discharged without the written approval of the magistrate committing them, except by a court of competent jurisdiction or other legal proceedings for that purpose. The act of 1864 is not as carefully worded as these two acts in relation to vagrant and disorderly persons, but I think the intention was the same, and that the words, "or review by a court of superior jurisdiction to the magistrate making the commitment," may be held to embrace the extent to which a judge, upon *habeas corpus* and certiorari, may review the proceedings of magistrates upon criminal process; that is, to the extent of ascertaining whether the magistrate acted in a matter of which he had jurisdiction. The writ of *habeas corpus* was from its inception a prerogative writ. At common law, it stood upon the same footing as other writs of that character, such as a *quo warranto*, mandamus, certiorari, prohibition, &c., and was dealt with upon the like general grounds and principles. (3 *Bl. Com.*, 131–2; Rex *a.* Cowle, 2 *Burr*, 855–6.) The proceedings under it, as in all prerogative writs, were regarded as appellate in their character (*Ingersoll on Habeas Corpus*, 36; Yates' Case, 4 *Johns.*, 360; *Bacon's Abr. Habeas Corpus*, A.); and it is said by Chief-justice MARSHALL, in *Ex parte* Tobias Watkins (3 *Pet.*, 203), to be "in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment." In this State, where the writ issues on behalf of a person restrained of his liberty, the proceedings are regulated by statute, by which the provisions of the common law have been abrogated, except so far as they may be necessary to carry out the provisions of the statute. (2 *Rev. Stat.*, 573, § 73.) By the statute the writ issues under the seal of the Supreme Court; and whether allowed and heard by the court or by an officer authorized to grant it, the proceedings are the

same, and the judge or officer before whom it is returnable is clothed with all the power given by the statute to the court. (3 *Hill*, Appendix, note 5.) He may, therefore, be said to act, within the limits prescribed by the statute, as a court. There are in a court, according to Blackstone, three constituent parts, *actor*, *reus*, and *judex;* the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, the law arising upon it, and, if an injury has been done, to apply the remedy. (3 *Bl. Com.*, 25.) All these exist in the proceeding which is had before a judge upon a writ of *habeas corpus*. He acts not ministerially, but judicially. (3 *Hill*, Appendix, note 4.) The statute gives him the right to imprison (§ 34); and where an authority is created by statute, with power to fine or imprison, the officer, person, or body invested with such authority is, for that purpose, deemed a court. (Denbawd's Case, 10 *Coke*, 103; Grenville *a.* The College of Physicians, 12 *Mod.*, 388; Groenvelt *a.* Burwell, 1 *Comyns*, 76; S. C., 1 *Salk.*, 200; 3 *Bl. Com.*, 24; Briggs *a.* Mackellar, 2 *Abbotts' Pr.*, 61.)

The power, therefore, which a judge exercises upon *habeas corpus* to inquire into the cause of the detention, where a party is deprived of his liberty, is, in the language of the statute of 1864, as applied to cases like this, a review by a court of superior jurisdiction to the magistrate making the commitment.

This disposes of all the questions before me; and the parties brought up upon the several writs will be remanded or discharged according as the decision affects their several cases.

MASON *a.* RING.

New York Superior Court; General Term, May, 1863.

ORDER.—STIPULATION.—REFERENCE.

The plaintiff having recovered a judgment setting aside a conveyance made by him of certain lots of land, and requiring the defendant to reconvey them to

him, the defendant appealed, and executed and deposited with the clerk of the court a deed thereof, as security to abide the event of the appeal; and also stipulated with the plaintiff that any taxes, &c., paid by the latter should be a lien in his favor in case he should not ultimately prevail in the action. The Court of Appeals affirmed the judgment, but directed that the defendant be let in to prove a claim against the plaintiff for services, and that the lands stand as security for such claim, with power to the court below to release all or a part of the lands, or substitute other security, as might be equitable.

Held, that this authorized the court below, pending the further litigation, to release and order to be sold sufficient of the land to repay to the plaintiff the taxes, &c., which had been paid by him.

Pending the reference in such case to determine the amount due to the defendant, it is not proper to order another reference to ascertain what amount will probably be allowed him, and to release to the plaintiff so much of the land as is not necessary to secure such probable amount. The amount should be ascertained by prosecuting the first reference; and meanwhile the security should not be changed or diminished, unless the plaintiff shows that continuing the existing security is a matter of special prejudice to him.

Appeal from an order.

In this action, the plaintiff sought to set aside a conveyance of forty-five lots of land in the city of New York, which he had made to James J. Ring, deceased, of whose estate the defendant, Zebedee Ring, was the administrator, and which was intended as a compensation for the intestate's services and disbursements as attorney and counsel and otherwise, during a period of thirteen years.

The plaintiff obtained a judgment of this court, upon a trial before Mr. Justice HOFFMAN, requiring defendant to reconvey to the plaintiff the land in question: from which judgment the defendant appealed; and pending the appeal he executed the deed required by the judgment, and deposited the same with the clerk of the court, to abide the event of the appeal. The parties then entered into a stipulation, in which, after reciting the existence of such judgment, conveyance, and appeal, and the fact that there were taxes and assessments unpaid, and that other taxes and assessments might become a lien before the conclusion of the controversy, they agreed "that if the said James Mason shall have paid, or pay and discharge, or cause to be paid and discharged, any taxes and assessments, liens which have, at any time since the said judgment, been, or now are, or hereafter, before the termination of the controversy as aforesaid, may in any way exist or encumber the said lands, or

any part thereof, that the moneys so paid, with the interest upon them, shall, in case the said Mason shall not ultimately prevail, be and become a lien, in the nature of a mortgage, in his favor upon the said lands; and that the said Zebedee Ring, his executors, administrators, and assigns, shall, in that event, pay the said Mason the amount of taxes and assessments thereon so paid, with the interest thereon.

"And that the said Zebedee Ring, his heirs or representatives, shall not be entitled to receive back from the clerk of this court the said deed, and the same shall not be returned to him upon any judgment in his favor in the said action, or upon such appeals, until he or they shall have paid or reimbursed to the plaintiff, or his legal representatives, any sum or sums of money paid by him or them for any liens for taxes or assessments which existed upon the said lands at the time of the original judgment recovered before Justice HOFFMAN, or at any time thereafter, prior to the decision of such appeals, together with the interest thereon."

Upon the appeal to the Court of Appeals, that court set aside the conveyance, but held that the defendant was entitled to recover compensation for the intestate's services: they opened the judgment appealed from for the purpose of having the value of the services, other than professional, ascertained and allowed to the defendant; and for this purpose directed the court below to proceed by reference or otherwise, and declared that the land in question should stand as security for the payment of such sum as might be found due by the plaintiff to the estate of the intestate. The remittitur contained some further provisions, which are hereinafter stated in the opinion of this court.

On the 29th of November, 1861, the plaintiff applied to this court upon the remittitur and affidavits, and obtained an order referring it to Henry Nicoll, Esq., to inquire and report on such claim. Some proceedings incidental to the reference are reported, 10 *Bosw.*, 598.

The plaintiff moved at special term in March, 1863, for an order that the deed of the lands be delivered to the plaintiff, on his giving a mortgage thereon to the defendant for such sums of money as might ultimately be adjudged due to him, with leave to sell from time to time, on substituting the pro-

ceeds of sales for the part sold; or that a part of the lots might be released from any lien in favor of the defendant, or that the plaintiff might have leave to sell or mortgage a part of the lots. This motion was made on affidavits alleging that delays in the prosecution of the reference to ascertain the defendant's claim had been caused by the defendant, and that meanwhile the plaintiff had paid upwards of $17,000 taxes and assessments on the 45 lots, and that the value of all the lots was upwards of $150,000; and that if nine of the least valuable were sold they would probably produce upwards of $21,000, sufficient to repay the assessments in question.

The defendant opposed this motion, upon an affidavit explaining the delays upon the reference, and alleging that several of the lots would have to be taken for opening new streets, and that what would remain would be very heavily assessed for improvements; and that the lots remaining, if enough were sold to repay the assessments already paid, would not much exceed in value the amount of the defendant's claim, if substantiated, and that the security now held by the defendants ought not to be diminished.

The motion was granted, the following opinion being rendered.

Robertson, J.—By the judgment of this court, which in that respect is not altered by the judgment of the Court of Appeals, the conveyance to the defendant's intestate, which was in question, has become, irremediably, a mere security for the amount due from the plaintiff,—in fact, a mortgage,—while the plaintiff is owner of the fee.

The instrument under seal, executed by the defendant while the appeal was pending, although in form a contract, the rights arising under which in other respects may not be interfered with in this action, is a stipulation in the action, so far as the retention by the clerk of the court of the deed executed by the defendant, for the security of advances by the plaintiff for taxes and assessments, is concerned. That instrument evidently contemplated the determination of the controversy by the decision in the court of last resort, either by the reversal or affirmance of the decision in this court; in the former case making the advances to be on account of property of the defendant, and in

the latter, of the plaintiff. The defendant cannot deprive the plaintiff of the benefit of the deed in the clerk's hands, as security for such advances; and as the property now belongs to the plaintiff, the payments have turned out to be on his own account.

Whether the Court of Appeals had this agreement under seal before them when making the order in the remittitur, is immaterial: they did give this court power to modify the security. They, probably, having overthrown the deed as a conveyance from client to counsel, intended that the latter should only have so much security as would protect his claim, and left it to the court to regulate it.

The plaintiff has strengthened the defendant's security, as well as protected his own interest, by the payment of taxes and assessments on the whole property. If it does not impair that security, he ought to have at least as much of the land conveyed to him as would enable him to reimburse himself for the outlay. The valuation of the lots on Fifty-fifth street, between Madison and Fourth avenues, seem sufficient for that purpose. The estimate of the rest of the property, given by an expert, who is not contradicted by any one shown to have any knowledge of the value of real estate in the neighborhood, is shown to be $122,000, exclusive of the land taken for Madison Avenue. The plaintiff has a judgment in this case for nearly $20,000, on which interest is due from its rendition, in November, 1858, amounting at present to nearly $25,000. This judgment was for money had and received for the plaintiff's use. The defendant's claim, as sworn to, is about $75,000, principally for work and labor, and some expenditure of money, the details of which are not given; and there is no evidence that any account was ever rendered. Interest, therefore, is probably not allowable on it (Rensselaer Glass Factory *a.* Reid, 5 *Cow.*, 587; Robinson *a.* Stewart, 10 *N. Y.*, 189); but if allowed for the same time as the plaintiff's claim on the judgment, the amount would swell to $97,000, and deducting the sum of $25,000 due to the plaintiff, the balance due the defendant would be $72,000. It would, therefore, be reasonable to give the defendant the benefit of as much of the land as would be security for $75,000, the largest amount which he would recover.

The plaintiff has never bound himself to pay any taxes and

assessments, and each party, without the agreement before mentioned, would have been obliged to protect his own interest by keeping down taxes and assessments. Still, it is possible that such encumbrances may arise before the determination of the controversy in this case; and as the plaintiff now is in the position of a mere mortgagor applying to redeem, enough property should be included in the mortgage to secure the defendant for any possible payments he may be obliged to make for taxes or assessments, unless the plaintiff can protect him by a separate bond of indemnity with good sureties against them.

In order to ascertain how much the probable amount of taxes and assessments may be, and what part of this land may be left in the hands of the defendant, as security therefor, and for the payment of $75,000, in case he recover the same and interest, there must be a reference to the same referee, before whom the proceedings for an account are pending, to determine what portion of the premises in controversy are sufficient for the purpose. The plaintiff may have forthwith a release of the property on Fifty-fifth street, if he desire that as part of the property to be released to him, and the reference can proceed as to the residue. Upon the confirmation of the referee's report, the defendant must release to the plaintiff the property not reported to be necessary for his own security, or the deed in the clerk's hands can be delivered to the plaintiff, who shall thereupon execute and deliver to the defendant a mortgage to him upon the land so reported to be a proper security, conditioned to pay the amount to be found due, on the accounting, and also a release of the covenant under seal contained in the agreement already referred to.

The order made herein to be settled on two days' notice, and amendments to be served one day before.

Pursuant to this decision, an order was entered, directing the clerk to deliver the defendant's deed to the plaintiff, upon the plaintiff's delivering in return therefor a mortgage on thirty-six of the lots conditioned for the payment of whatever sums should ultimately be found due to the defendant in the action, and on the plaintiff at the same time delivering a release of the covenants contained in the stipulation above referred to, and further providing that it be referred to the same referee.

who was proceeding with the investigation of the defendant's claim, "to inquire and report how many of the said thirty-six lots of land, if any, will be necessary or required to give the defendant sufficient security for the payment of the amount likely to be awarded to the defendant on the final judgment in this action . . . . and also any probable amount of taxes and assessments likely to accrue on such portion, if any, of the said thirty-six lots so required, before the termination of this action; and that on the coming in and confirmation of the report of the referee on the inquiry hereby directed, the said defendant shall execute and deliver to the plaintiff a release, from the said mortgage, of all of the said thirty-six lots of land, as shall not be reported as necessary or required to give the defendant sufficient security."

From this order the defendant now appealed.

William Curtis Noyes, for the defendant, appellant, argued that the stipulation gave Mason only a lien on the land for his payments, and no right to enforce reimbursement until the termination of the controversy; and that the whole property was no more than security for the probable amount of the defendant's claim, and that to compel the delivery of a deed and the acceptance of a mortgage was a substantial alteration of the decree, and of the contract of the parties.

Henry A. Cram, for the plaintiff, respondent, insisted that the decision and remittitur of the Court of Appeals empowered this court to make the order appealed from; and that as to form and detail its provisions were matter of discretion; which discretion, if its exercise could be reviewed on this appeal, was wisely exercised in this case.

By the Court.*—Bosworth, Ch. J.—The remittitur from the Court of Appeals contains the following provisions, viz.:

"And it is further ordered and adjudged that the said Superior Court may from time to time, on the application of the plaintiff, make such order as to the forty-five lots standing as security aforesaid as said Superior Court may deem proper,

* Present, Bosworth, Ch. J., and Moncrief and White, JJ.

either by releasing entirely or in part such forty-five lots as such security, or by allowing other security to be substituted; the said Superior Court to have the full power to do from time to time what shall be just and equitable between the parties as to security.

"And it is further ordered, that on the delay or the default of the defendant to prosecute the inquiry hereinbefore mentioned, the plaintiff shall be at liberty to prosecute the same. It is further ordered, that this judgment is to be without prejudice to the right of the court below to give such effect to any stipulation between the parties as such court shall think proper."

These provisions confer upon the court authority and jurisdiction to make the order appealed from.

Assuming that the manner of exercising discretion in making the order may be reviewed on appeal, we perceive nothing justifying a reversal of so much of it as directs a release of the nine lots. The accuracy of the valuation affixed to the nine lots to be released is not questioned, and it exceeds by only a small sum the advances made by the plaintiff to pay taxes and assessments.

So much of the order as directs a reference to ascertain the amount likely to be awarded to the defendant on the final judgment in this action, while a reference is pending to determine that amount, is not free from objection. The prompt and due execution of the latter order of reference will render the former an idle ceremony. There is no reason why the amount to be allowed to the defendant should not be ascertained with reasonable diligence. If there are intrinsic difficulties in ascertaining that sum, and if those difficulties necessarily require considerable time, there will exist the same difficulties in the way of a more speedy ascertainment of what that sum is likely to be. The plaintiff is authorized to prosecute the inquiry as to the amount actually due, if there be delay or default on the part of the defendant. And if there be no such delay or default, it is difficult to perceive why there should be a reference to ascertain the probable amount, pending the progress of a reference to ascertain the actual amount.

The plaintiff is not entitled to a release of the lots merely because he may desire it. Any amount which may be found due to the defendant is declared to be a lien on all the lots. Unless

it be shown to be a matter of special prejudice to the plaintiff to continue the existing security, so that justice to him and a due regard to his interests require that he should be permitted to substitute other security, or to have additional lots released, the defendant should not be deprived of the lien which has been adjudged in his favor.

The order must be modified, by reversing so much of it as directs a reference; and as thus modified it must be affirmed, but without prejudice to the plaintiff's right to apply hereafter, from time to time, on showing facts calling for the interposition of the court, for a release of further lots, with or without giving substantial security, or for such other relief as may be just.

WILLIAMSON'S CASE.

Supreme Court, First District; At Chambers, June, 1865.

COMMITMENT BY SPECIAL SESSIONS.—RECORD OF CONVICTION.—HABEAS CORPUS.

It is not necessary, upon a conviction by the Court of Special Sessions in the city and county of New York, that a record should be filed.*

If it were—*it seems*, that the omission to file one would not be ground for discharging the prisoner upon *habeas corpus*.

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* Compare also the case of THE TWELVE COMMITMENTS, *Ante*, 394.

In DE LA MONTANGE'S CASE (before HOFFMAN, *Recorder* of the city and county of New York, November, 1864), it was held that the filing of a record of conviction is essential to the validity of a commitment by a police justice for vagrancy.

In this case, upon the application of the relator's counsel, the recorder allowed a writ of *habeas corpus*, directed to the superintendent of the "House of Refuge," directing him to produce before him William De La Montange.

The superintendent produced the boy, and made a return to the writ that he detained him by virtue of a commitment made by one of the police justices of the city of New York, upon a conviction of vagrancy.

No question was made as to the form or sufficiency of the commitment itself,

Habeas corpus, to inquire into the detention of John Williamson, who was imprisoned in the House of Refuge.

INGRAHAM, P. J.—A writ of *habeas corpus* was allowed in this case, and a return is made that the prisoner is held by

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but it appeared that no record of conviction was ever filed in the office of the Clerk of the Court of General Sessions.

John Quackenbush, for the petitioner.

Henry A. Cram, for the respondent, insisted that the statute requiring that a record of conviction should be filed in cases of conviction of vagrancy, is directory merely; and that a failure on the part of the magistrate to file such record does not invalidate the conviction.

HOFFMAN, *Recorder*.—The subject of the powers of magistrates, in cases of summary convictions, was very fully and very ably discussed by Circuit-judge EDMONDS, in the case of The People *a.* Eliza Philips, reported in 1st Parker's Criminal Reports, 95; and in that case he expressly decided that such powers, being in derogation of the common law, must be strictly conformed to, and be exercised in accordance with the special statute from which they were derived; and that, in every case of summary conviction, a record must be made up, as a prerequisite to a commitment,—1st, for the protection of the accused; 2d, for the protection of the magistrate; and 3d, because, in the absence of any right of appeal, it was the only way in which a sentence could be reviewed by *habeas corpus* or certiorari founded on the record. In the course of his opinion, he says: "It is a well-established rule, that a record is an absolute prerequisite to a commitment." And, quoting from "Ward's Justice" in relation to the rule at common law, he says: "There must be a record of the whole proceedings; wherein the justice must set forth the particular manner and circumstances, so that, if called to an account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction."

He cites, also, 1st Bay's South Carolina Reports, which decides that, "If there is not a record of conviction, &c., &c., the common law will 'break in upon' the justices and level all their proceedings."

Without referring more particularly to the case as decided by Judge EDMONDS, I think a reference to the phraseology of the acts of the Legislature, in reference to convictions for vagrancy, will sustain his conclusion "that a record is a prerequisite to a commitment."

The act of January 23, 1833, chapter 11 of the Laws of 1833, provides for the trial and conviction of vagrants by magistrates in the city of New York; and section 3 provides as follows:

"If such magistrate shall be satisfied, &c., &c., he shall make up and sign a record of conviction, which shall be filed in the office of the clerk of the Court of Sessions; and shall by warrant under his hand and seal commit, &c., &c.

This law thus directs the record to be made and filed; and that direction, in the order of language, precedes the direction as to the commitment.

The same provision, in precisely the same phraseology (except as regards the

virtue of a commitment from the Special Sessions, on a conviction before that court.

The conviction and commitment appear to be valid; and where that is the case, it is the duty of the magistrate to remand the prisoner.

It is urged that no record of conviction has been filed in the county clerk's office, and therefore the prisoner should be discharged. No such fact appears before me; and even if it did, it is hardly a proper inquiry on *habeas corpus*, where the statute has made it the duty of the magistrate not to extend his inquiry behind the commitment.

Besides, the necessity of filing the record of conviction on trials before the Special Sessions has ceased. The act of 1858, 441, ch. 282, § 5, provides that transcripts of convictions shall

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place of filing the record), is found in the statute applicable to the State at large. (See vol. ii., 5 ed. *Rev. Stat.*, 879.)

The fair inference from the language of the law is, that even if the record is not to precede the commitment, it is to be made and filed contemporaneously therewith, and that both are essential to a legal conviction.

The subsequent acts of the Legislature have not added any thing, or taken any thing from these statutory provisions relating to the city of New York. Chapter 183 of the Laws of 1853 merely prescribed the form of the record, and chapter 268 of the Laws of 1855 prescribed a different and more particular form.

The original statutory provision, in the language quoted as above, stands unchanged.

It is clear to my mind that the Legislature intended that the record and commitment should be both essential; that without a record there should be no commitment,—and this precaution was for the protection of the citizen, and absolutely necessary for that purpose, as shown by Judge EDMONDS. That part of the statute which requires a record to be made and filed, is no more directory than that part which provides for a commitment.

Without a commitment, there can be no lawful imprisonment; and without a record, there can be no lawful commitment.

I have been referred by counsel for respondent to the decision of Justice SCRUGHAM, in the case of The People on the relation of Thomas Hovey.

Without examining that case at length, it is enough to say that Justice SCRUGHAM placed his decision on the ground that the conviction was in the Special Sessions of Kings County, and that the statute applicable thereto did not require (what is called) "the certificate of conviction" to be filed until twenty days after conviction. (3 *Rev. Stat.*, 5 ed., 1011, § 68.) Of course, under that provision, it could not be claimed that the filing of a record or certificate was a prerequisite to a commitment.

For the reason above given, I order the discharge of William De La Montange.

not be required to be filed, but makes a certified copy by the clerk of the Court of Special Sessions evidence.

A similar provision may be found in the act of 1830, ch. 42.

There are cases where convictions take place before other officers than those holding the Special Sessions, where it is necessary that a record of conviction should be filed. Such, for instance, as that provided for by the 3d section of the act of 1833, ch. 11, where it is to be filed with the clerk of the Court of Sessions. This, however, does not apply to the Court of Special Sessions.

The prisoner should be remanded.

PERSSE & BROOKS PAPER-WORKS *a.* WILLETT.

New York Superior Court; General Term, July, 1863.

EVIDENCE. — PRINTED LAWS. — DEFECTIVE INCORPORATION. — FRAUD IN ORGANIZING AND ASSIGNING TO A CORPORATION. — WITNESS.

A charter of a private corporation, enacted by the legislature of another State, is a law within the meaning of section 426 of the Code of Procedure, which declares that "printed copies in volumes of statutes, code, or other written law" of other States, shall be admissible in evidence in the courts of this State.

Alleged defects in the proceedings to organize a corporation are not available to defeat an action brought by the corporation for a trespass in wrongfully taking property from their possession.

A transfer, by a partnership, of the partnership property, to a corporation formed by the partners for the purpose, in payment for which the partners take the stock of the corporation in their individual names, is not *per se* fraudulent as to the creditors of the partnership.

The mere fact that partnership property is transferred, in exchange for other property, which is transferred to the members of the firm individually, does not make the transfer *per se* fraudulent; nor is it conclusive evidence of intent to defraud or delay the partnership creditors, if the substituted property is as valuable as that sold, as accessible to process, and as readily convertible into money by judicial proceedings. The mere fact that the title to the substituted property is taken by the members of the firm severally, can only be important in connection with other evidence tending to show a fraudulent intent.

Upon the question whether the act of partners, in procuring a statute incorporating them and their associates, and in transferring their property to the cor-

poration so formed, was fraudulent as against creditors, it is admissible to prove that, after the firm had made an assignment for the benefit of creditors, one of their number, acting as the chief officer of the alleged corporation, and having, as such, the control of the property, in the presence of the assignee and of the servants of the alleged corporation, assented to the assignee's taking control of the property in virtue of his right as assignee.

Upon the question of the good faith of a transfer of their property, by debtors, to a corporation of which they were the officers, their acts and declarations, subsequent to the transfer and while in possession, respecting the use and disposal of it, tending to show that they treated it as if still their own, are admissible.

After testimony has been elicited from a witness, on an examination by either party, which would require the submission to the jury of the question of fraudulent intent in an assignment made by such witness, it is proper for the adverse party to ask whether the act was done with fraudulent intent; and in answer to such question, it is proper for the witness to state the particular reasons which induced the act, and that he communicated those reasons to his creditors before the act.

In an action by a corporation against a sheriff for levying on its property under process against the persons who composed the corporation, the defence was that such persons had been, as partners, owners of the property, and that, on failing, they formed the corporation and transferred the property to it with intent to defraud their creditors.

Held, 1. That evidence that, between the time of the transfer and the time of the levy, the corporation made profits in the business, and that before and at the time of the failure of the firm there was a panic in the market, was admissible; but the admission of such evidence did not make it competent to inquire as to the profits of the corporation up to the time of trial.

2. That a witness, having testified that he was in the employment of the firm as superintendent, for a period extending beyond the time of the transfer, might be asked, on cross-examination, if he was superintendent under the corporation.

3. That entries made in the firm's books, by others than the partners, and after they had made a general assignment for benefit of creditors, and no longer had control of the books, were not admissible.

Upon the question of the solvency of the firm in such a case, it is not competent to ask a book-keeper if the books show whether they were solvent.

Evidence is not admissible that the paper of the firm was in the hands of street brokers, or of what it was offered to be sold for, or that such offers induced creditors to recall loans made to the firm.

Evidence of admissions of the firm that paper was issued by them to be sold or discounted at usury, is only admissible if such declarations were made before the alleged fraudulent transfer.

This was an appeal from an order of the special term denying a motion for a new trial, and from a judgment entered on a verdict in favor of the plaintiff for $13,173.52.

The action was brought against the defendant, the sheriff of the county of New York, to recover damages for the taking

and conversion, in April, 1858, of chattels alleged to belong to the plaintiff, a corporation created by the laws of the State of Connecticut.

The taking was justified under several judgments and executions in favor of creditors of the firm of "Persse & Brooks," composed of Dudley Persse, Horace Brooks, and Daniel H. Magie.

The cause was tried before Chief-justice BOSWORTH and a jury, commencing on the 26th March, 1862.

The contest, on the trial, related to the validity of the creation of the corporation, plaintiff, composed of the members of the firm of "Persse & Brooks" and one of their agents, and of alleged transfers of property to it, by the firm, which the defendant claimed to be fraudulent as against the creditors of "Persse & Brooks."

It appeared that, for some years prior to August 1, 1857, the firm of Persse & Brooks had been engaged in manufacturing paper, and were owners of extensive mills in Connecticut.

The plaintiff claimed that, in May, 1857, the same persons who composed the firm of "Persse & Brooks," viz., Dudley Persse, Horace Brooks, and Daniel H. Magie, were by act of the legislature of Connecticut, created a corporation under the name of "The Persse & Brooks Paper-works," to be organized, etc., by opening books for subscription to its capital stock, to the amount of $600,000, with power to increase, etc., and to organize when $300,000 of stock was taken, the shares being $100 each, to be managed by not less than three directors.

That, on the 1st day of August, 1857, the proposed corporation was organized, the subscriptions to the stock being made at the same time as follows:

Dudley Persse	2,195	shares,	or	$219,500
Horace Brooks	2,195	"	"	219,500
Daniel H. Magie, by his attorney, Horace Brooks, under a verbal power	100	"	"	10,000
Theophilus B. Persse, a brother of Dudley Persse, and one of the employees of the firm	10	"	"	1,000
Making	4,500	shares,	or	$450,000

That at the same time Dudley Persse and Horace Brooks conveyed to the alleged corporation all their mills, machinery, and dwelling-houses at Windsor Locks, for an assumed consideration of $450,000, as payment of their subscriptions for the stock, and the stock was issued in the several individual names of the partners in the relative proportions and numbers above stated.

That Dudley Persse, Horace Brooks, and T. B. Persse, elected Dudley Persse, Horace Brooks, and Daniel H. Magie, directors of the alleged corporation.

And Horace Brooks and Dudley Persse elected Horace Brooks, president; Dudley Persse, treasurer; and T. B. Persse, secretary.

It appeared that Magie never paid any thing for the stock which was issued to him, and T. B. Persse only subscribed because the parties contemplated his continuing to superintend the works; and though he gave his note, he never paid it, but got it back.

Salaries were provided—for Brooks and Persse $5,000 per annum each, and Magie $2,000.

The plaintiff also claimed that, pursuant to an agreement then made, the firm of Persse & Brooks, on or about the 1st of September ensuing, transferred to the alleged corporation the rags, stock, and materials to be manufactured, and other personal property on hand, to the amount of $126,331.96, at a credit of twelve months, including paper on hand in the city of New York; and that, after the 1st of September, the mills were run for the corporation, and the firm of Persse & Brooks were only agents buying for the corporation, and selling paper to account therefor to the corporation. On the 22d of September, 1857, the firm of "Persse & Brooks" failed, and made an assignment for the benefit of creditors, to George J. Forrest, owing at that time $588,180.02, having partnership assets to the amount of $206,923.87.

The defendant claimed that there was never any legal organization of the alleged corporation.

That the scheme or plan of creating and organizing such an apparent legal entity was a fraudulent device gotten up by Persse & Brooks, to convert their property into a form which would hinder, delay, and keep off their creditors, and with a

view either to avoid the payment of their debts or to compel the creditors to take stock therefor.

That the design of the pretended organization was as last stated, and with the further fraudulent purpose to retain the actual control of the property, under color of being officers and directors, and to secure to themselves large salaries, notwithstanding their insolvency.

That the transfer of the property in Connecticut was with the purposes aforesaid, and to place the property conveyed beyond the reach of creditors.

That the alleged transfer of $126,331.96 of paper, materials, &c., in New York and Connecticut—if any such form or semblance of transfer was made—was made to hinder, delay, and defraud their creditors. And also that, being upon credit, it necessarily had the effect to delay.

And hence the defendant claimed that the levy made by him upon certain of the paper, &c., in New York, under executions against the partners, was lawful.

Upon the trial, to prove the charter of the plaintiffs, their counsel offered in evidence a printed volume of the statutes of Connecticut containing it, entitled, "Resolutions and Private Acts of the General Assembly of the State of Connecticut;" to which the defendant's counsel objected, on the ground that the book offered was not a volume of laws, entitling it to be read in evidence under the statutes or laws of this State. The court overruled the objection, and the defendant's counsel excepted.

In the course of the examination of Thomas Mickle, a witness for the defendant, who had testified that he had been in the employment of the firm, as superintendent of their mills, from 1855 to the end of October, 1857, the counsel for the defendant offered to prove (by a witness to be afterwards called) that Forrest (the assignee of the firm) came to the mills with Horace Brooks at the time of the failure of the firm, and that Brooks and Forrest stated facts and gave instructions that showed that the firm of Persse and Brooks owned and controlled the works and the property there, and that the superintendents and agents of the alleged corporation submitted to the instructions, and acquiesced therein; and also to show what was the actual conversation which T. B. Persse (a prior witness) had testified to.

The plaintiff's counsel objected to this as incompetent. The court sustained the objection, not that it was not in the proper order of proof, but not competent evidence, and the defendant's counsel excepted.

The defendant's counsel then further offered to prove that Forrest and Horace Brooks went to the mills on September 23, 1857, from New York; that they called T. B. Persse and the witness into one of the rooms in the mills, and in the presence of Mr. Barnes, as counsel for the parties, Forrest stated in their presence to the superintendents that every thing there had been assigned to him, and that thereafter the mills would be run in his name and on his account; that Brooks assented to the statement, and that the superintendents continued the works under that instruction as long as the witness stayed there—that is, until the latter part of October, 1857—and without that direction being countermanded to the knowledge of the witness. The plaintiff's counsel objected to this, and the court sustained the objection, unless it should be also proved that Persse and Magie knew of and assented thereto; and the defendant's counsel excepted.

John F. Zebley, also a witness for defendant, was questioned in reference to a conversation he had with Mr. Brooks shortly after the failure of the firm; and the counsel for the defendant offered to prove by this witness that Brooks told him in that conversation that Persse & Brooks were running the mills under an act of incorporation, and intended to shield themselves by it—that they were then working up their rags to pay their confidentials. To this the plaintiff's counsel objected; the court sustained the objection, and the counsel for the defendant excepted.

James H. Benedict, another witness, was also asked by the defendant's counsel to state a conversation had by him with Mr. Persse several months after the failure of the firm. This evidence the counsel stated that he offered in order to show that in negotiations with the witness for the purchase of rags to be used at the mills, Mr. Persse made statements, as part of such negotiations, regarding the purposes to which the paper to be made therefrom was to be applied, which bore upon the character of the business carried on at the store and at the mills, and the interest of the parties therein. This evidence

was also excluded under an exception. A question whether the witness observed any change during 1857, in the appearance of the store or the manner of doing business, was likewise excluded.

Mr. Brooks, one of the firm, having been examined and cross-examined as a witness, the plaintiff's counsel, upon a redirect examination, inquired as to the reasons for the incorporation; and asked: Was there or not any motive to defraud creditors?

This question was objected to by defendant's counsel. The objection was overruled, and the defendant's counsel excepted.

A. I never dreamt of defrauding creditors. Our credit at that time was very good. We had no difficulty in buying any amount of goods we had occasion to purchase on credit. We were solvent at that time. There was a petition presented by us to the legislature of Connecticut for this incorporation.

This witness was permitted to testify that up to July, 1858, the corporation made profits; and upon the examination of Charles H. Dexter as to the profits of the business, the court excluded any inquiry, whether up to the time of the trial the corporation made any profits or not, saying that the defendant might go into the inquiry, whether during the period that Mr. Brooks testified to they made any profits or not. To which exclusion the defendant's counsel excepted.

Benjamin Galbraith, a witness for defendant, was asked: Do you know what Persse & Brooks' notes were offered for by them in the spring or summer of 1857?

A. They never offered any of their notes to me.

Q. Did any one on their behalf?

A. I was offered their notes, but whether it was on their behalf or not I cannot tell.

Q. I ask what the offer was?

This question was objected to by the plaintiff's counsel. The court sustained the objection, but stated that he would allow proof of what it was offered for with their knowledge, and the defendant's counsel excepted.

The same witness, having testified that he had, as agent for Mr. Bennett, collected from Persse & Brooks two sums of $5,000 and $20,000 respectively, due Mr. Bennett, was asked:

How did Mr. Bennett come to make a draft on Persse & Brooks for his money at the time he did?

This question was objected to by the plaintiff's counsel. The court sustained the objection, and the defendant's counsel excepted.

The defendant's counsel thereupon offered to prove that Mr. Bennett was induced to withdraw his funds in the hands of Persse & Brooks in consequence of offers to sell to him Persse & Brooks' notes made in March, 1857. This was objected to by the plaintiff's counsel. The court sustained the objection, and the defendant's counsel excepted.

He was subsequently asked: Did you apply the payment of the $20,000 received of Persse & Brooks to the payment of property of Mr. Bennett at Washington Heights?

This question was objected to by the defendant's counsel. The court overruled the objection, and the defendant's counsel excepted.

A. I made a cash payment on that property with the $20,000 that I drew from Persse & Brooks, and I drew it for that purpose.

In the course of the trial, the counsel for the defendant also offered to read in evidence the answer of Persse & Brooks, as defendants in an action against them on sundry promissory notes, dated in June and July, 1857, which answer was sworn to by Horace Brooks, February 13, 1858; and set up that such notes were issued by them to raise money, and that they were discounted at usurious rates of interest. The court excluded this evidence, unless it suggested that it was in conflict with what Brooks stated; and the defendant's counsel excepted.

In charging the jury, the court instructed them that "if the intent and object of the creation of the corporation, and of the transfer of the property to it, were to use the corporation as a shield or cover, and place the property so transferred beyond the reach of the creditors of Persse & Brooks, by ordinary legal process, then the title is invalidated by transactions between Persse & Brooks and the corporation, had after its organization.

"In determining whether this was the intent and object of the creation of the corporation, and of the transfers of the property to it, made on the 1st of August and the 1st of Sep-

tember, 1857, you must place yourselves back to that period of time, and view things as you believe from the evidence the parties to the transactions then viewed them, and determine their intent from what they did, and the manner in which they acted, and the knowledge they then had, with such additional light as the subsequent transactions allowed to be proved shed upon this question and that intent.

"The transfer of the real property in Connecticut, and the mere fact of taking stock therefor, in the individual names of the partners, do not furnish conclusive evidence of a fraudulent intent. If on a conveyance of property of the firm, valued at $450,000, the stock received in payment therefor was taken in the individual names of the partners, with a view to convert it into individual property, to be used and disposed of as such, it would be *per se* fraudulent and void as to the creditors of the firm of Persse & Brooks.

"But if the members of that firm honestly believed themselves to be solvent, and did not contemplate a failure or suspension, and had no actual fraudulent intent in organizing the corporation, or in making the transfers of property, or in receiving a transfer of the stock in their individual names, and had no intent nor thought of withdrawing the stock from the firm's assets, then the mere fact that the stock was taken in the individual names of the partners would not make the transfers of the property fraudulent and void as to the creditors of Persse & Brooks.

"In seeking for and determining the intent of the parties, it is just to conclude that they intended to produce such results as are the natural and necessary consequence of their acts; and if it can be seen that the natural and necessary consequence of the acts of Persse & Brooks, in transferring property to the corporation in the view they then had of their condition and resources, was to defraud, or hinder, or delay their creditors in collecting their debts, then they should be deemed to have done what they did do with that intent, and the transfers would be void as to their creditors . . . .

"It is a rule of law, that where personal property is sold or mortgaged, unless there be an immediate delivery of the property, followed by an actual and continued change of possession, the transaction shall be presumed to be fraudulent; and that

presumption shall be deemed conclusive, unless it be made to appear on the part of the purchaser or mortgagee, that the sale or mortgage was made in good faith, and without any intent to defraud the creditors of the vendor or mortgagor. If that is made to appear, then the presumption of fraud is removed.

"It is an equally fixed rule, that the property of a corporation in the possession of its officers is, in judgment of law, in the possession of the corporation itself.

"To apply these rules to the present case: if the personal property transferred continued in the actual possession of the firm of Persse & Brooks, without any thing in the manner of their dealing with it, or marking the nature and character of their possession to indicate that they ceased to hold and deal with it as owners, or that they held it as the property of others, then their subsequent possession would be conclusive evidence of fraud, unless the plaintiffs made it appear that the purchase by them was made in good faith, and that there was no intent to defraud the creditors of Persse & Brooks.

"This corporation could have employed any other of the firms in New York, being paper-dealers, to buy rags and material for it, and to sell its manufactured paper; so it might employ Persse & Brooks to do the same things, without thereby losing its title to property which it may prove it honestly acquired.

"If, after the 22d or 23d of September, 1857, Persse or Brooks bought whatever material they did buy as avowed agents of the corporation, and for its use, and if in selling paper they sold it as the plaintiff's paper, and in its name, and avowedly as its officers, and made the bills and receipted the payments in its name, such a possession of and dealing with the paper is not in law a possession by them as individuals, or by their firm as a firm, but is the possession of the corporation through its own officers and agents. . . .

"The defendant insists that Persse & Brooks were at the time insolvent, must have known it, and been conscious that their failure could not be long delayed; that a corporation was contrived to enable them to prosecute their business in its name; that the members of the firm of Persse & Brooks subscribed individually for the stock, when as individuals they had noth-

ing with which they could pay for it; that they took the stock in their individual names, and paid for it with the firm's property, valued at $450,000; that they also soon thereafter transferred other property of the firm, valued a $126,000, on a credit of 12 months, retaining nothing of substance with which to pay their debts; that the members of the firm elected themselves directors and officers of the corporation, Dudley Persse and Horace Brooks bargaining with themselves, and acting in the double capacity of members of the firm of Persse & Brooks and as officers of the corporation; and that nominally as such officers, but in truth on their own account, they continued the business precisely as they had previously done, without any one having any power or legal capacity to interfere with them or the business, or their manner of doing it, until their failure and assignment."

The counsel for the defendant requested the court to charge, among other things, that,

3. The conveyance of the property in Connecticut, in the individual names of the partners, was *per se* fraudulent and void as to the creditors of Persse & Brooks.

4. Such a conveyance, and taking such stock in the individual name was fraudulent and void as to the creditors of the firm of Persse & Brooks, even though it was done with an expectation and intention ultimately to pay the debts of the firm.

5. Such a transaction necessarily operated to hinder, delay, and defraud the creditors of the firm, and was void also upon that ground.

The court refused so to charge, and the defendant's counsel excepted.

The jury retired, and after a prolonged absence sent into court the following inquiry in writing, namely:

"Would an intent to delay without having an intention to defraud be sufficient cause for a verdict for the defendant?"

The court returned to the jury the following answer, namely:

"A transfer of property with intent to delay creditors, in order to be void, must be with intent to transfer it to prevent its being reached by ordinary legal process, or to postpone the period of time in which payment can be enforced by ordinary legal proceedings."

To which the counsel for the defendant duly excepted.

After a further absence the jury came into court, not having agreed upon their verdict.

Whereupon a juror arose and stated, that it was his opinion that they formed a corporation. It was done to delay payment to creditors. It was putting the creditors out of the regular course of law to collect their debts, by having to levy on stocks.

The court replied that the creditors could collect a debt as readily by levying on stock as on the property.

The juror then stated, I understand that, but whether it is putting the defendant out of the regular course, I want to know?

The court replied: "How can it put a man out of the regular course when one kind of property is substituted for another which can be sold. If valuable, the debt could be collected as well out of the stock as out of the land; if of no value, that is another thing.

"All I mean to say is, that when a man sells one piece of property, and takes some other property for it, and the property which he takes in exchange is just as open to process as that with which he parted; that of itself is not a delay within the meaning of the law such as would make the transaction void. It must be something which interferes, and is done for the purpose of interfering with a party's ordinary remedy by suit to collect his debt. With what intent it was done, is a matter for you to find. I merely state you the proposition that the stock was as open to seizure as the land."

To these further instructions of the court, and to each of them separately, the counsel for the defendant duly excepted.

The jury again retired and brought in a verdict in favor of the plaintiffs, and against the defendant, for the sum of $13,173.52.

The defendant's motion for a new trial having been denied, and judgment having been entered against him on the verdict, he now appealed.

L. B. Woodruff, for the defendant, appellant.—I. The proof of the act of incorporation was not competent.

Section 426 of the Code has no application to resolutions or private charters. The book offered did not purport to be a

volume of the laws of the State of Connecticut. The charter of a corporation is a contract made with the State, rather than a law of the State.

Hence the necessity, apart from express statute, of proving a charter, while courts take judicial notice of the laws of their own State.

II. The exceptions to the refusal to dismiss the complaint, and to the refusal to charge as requested, and to the charge given, are well taken. No sufficient organization of a corporation was proved.

III. The conversations of Horace Brooks, one of the parties alleged to have conspired with his copartners to defraud their creditors, had with third persons prior to the alleged transformation of the firm of Persse & Brooks into a corporation, were not competent evidence in favor of the plaintiff. His declarations of the motive and object of such a transformation were not admissible.

IV. The exceptions to admitting the statement of intent are insisted upon, notwithstanding the decision of the Court of Appeals in Seymour *a.* Wilson (14 *N. Y.*, 567).

The facts and circumstances attending the transaction are the proper evidence of the intent and purpose with which it was made.

The witness should not be permitted to decide the very question the jury are to determine.

V. Proof that the alleged corporation made profits during the first ten months, under the management of the alleged conspirators, did not tend to prove their good faith.

But if such evidence was proper, then it was competent to show that so soon as the company had exhausted the means of operating the mills which Persse & Brooks furnished them, by transferring to them property to the amount of $126,331.96, at twelve months' credit, they utterly failed to make any profits, and the stock became valueless.

VI. The exceptions arising on the rejection of testimony of Mickle are well taken.

VII. The statements of Brooks, while still in the possession of the property, and in its actual management and control, were also competent.

He was acting in the very business, and endeavoring to real-

ize the results of the fraudulent design; the act of incorporation was a shield, and he was working up the property for Persse & Brooks' benefit.

On the other hand, the conversations between the alleged fraudulent parties, conspiring together as the defendant insists, are not evidence in their own favor.

Declarations of an assignor or vendor, while he continues in the actual possession, are admissible, and this notwithstanding he is professing to act as clerk or agent. (Adams *a.* Davidson, 10 *N. Y.*, 309; Willies *a.* Farley, 3 *Car. & Payne*, 395; *Cow. & Hill Notes*, 4 ed., 327; Babb *a.* Clemson, 10 *S. & Rawle*, 419; S. C., 12 *Ib.*, 328; Clayton *a.* Anthony, 6 *Randolph*, 485; Wilbur *a.* Strickland, 1 *Rawle*, 458; Martin *a.* Reeves, 3 *Mart. Louis. R., N. S.*, 22.)

When fraud, as against creditors, is alleged, the declarations of the assignor or vendor, and of all others concerned in the alleged fraud, are admissible. (Crary *a.* Sprague, 12 *Wend.*, 41; 1 *Greenleaf's Evid.*, § 111.)

VIII. The exceptions to the rejection of Persse's statements rest upon similar grounds.

So proof, that there was no change in the manner in which the business of the store was conducted, and no ostensible change, should have been received.

IX. The objection to the question to the witness Mickle, whether he worked "under the corporation" or not, should be sustained. It was a question to be decided on the whole evidence, not on the opinion of the witness as to his legal relations.

X. The other rulings excepted to were erroneous.

XI. The jury should have been instructed in conformity with the requests submitted by the defendant.

The conversion of the entire mass of copartnership property into stock of a corporation, and appropriating that stock to the individual members of the firm, destroying its copartnership character and its immediate and certain liability for copartnership debts, operated necessarily and *per se* to hinder creditors; it created an obstacle to the collection of their demands.

There had been no change of possession, and the continued possession and control by the members of the firm of Persse & Brooks is presumptive evidence of fraud.

The circumstance that they had themselves assumed to act

in the character of officers of the alleged corporation, does not alter the legal effect of the fact that they were still in actual possession.

XII. Those portions of the charge which were excepted to were erroneous.

And the instructions given to the jury on their return to the bar were erroneous and calculated to mislead.

In substance they amounted to this: that if the stock taken by the several members of the firm of Persse & Brooks in the alleged corporation could be levied upon, there was no delay, and could be no intent to delay; and when to this was added that "the creditors could collect as readily by levying on stock as on the property," it substantially instructed the jury that the plaintiff was entitled to a verdict.

So the instruction that there must not only be an intent to interfere with the party's ordinary remedy by suit, but that the thing done must be something which does interfere, was erroneous.

A transfer with intent to hinder or delay creditors is void, whether the hindrance be effectual or not.

So also the transfer of the personal property in New York to a foreign corporation on a credit of twelve months, did hinder and delay.

XIII. There was nothing in the case to warrant the submission to the jury of the question whether, "although a charter was obtained and a company formed with intent to place the property of its contrivers beyond the reach of legal process," the corporation did not nevertheless buy whatever it bought "in the regular course of business honestly," and pay for it, and conduct its business solely for the interest of its stockholders?"

The charge submitted this question to the jury.

The organization of the company, and the sale and delivery of the deed of the property, were simultaneous acts, as nearly as in the nature of the things was possible. The intent of the formation of the company, if found to be to cover up Persse & Brooks' property, was the intent of the conveyance—the latter was the immediate execution of the fraudulent intent.

A finding of the jury that the company was formed in order to cover up the property of Persse & Brooks, yet that the con-

veyance, which was immediate, and in a just sense a part of the same transaction, was a purchase in the regular course of business honestly made, would be set aside as against evidence.

It amounts in good sense and in law to a contradiction.

The minds that conceived the fraudulent intent, and the minds that conceived the idea of the sale, and that acted in accepting the conveyance, were the same, and the whole transaction was one.

The same minds acting in the matter, the simultaneous conveyance was necessarily and inevitably the carrying of the fraudulent intent into execution. In the absence of any evidence of a change of purpose, a verdict to the contrary should not be sustained, and such a question ought not to have been submitted to the jury.

XIV. The verdict was not warranted by the evidence.

D. D. Field, for the plaintiffs, respondents, reviewed at length the numerous exceptions taken by defendant, and argued that they were untenable.

By the Court.*—Bosworth, Ch. J.—I. The act of the General Assembly of the State of Connecticut, incorporating the plaintiffs, is a law, within the meaning of that word as used in section 426 of the Code of Procedure. According to the legislative lexicology of the State of New York, every act of the Legislature, whether public or private, is a law within the meaning of the statutory provisions, as to the time it takes effect, and the manner of proving it. (1 *Rev. Stat.*, 157, 10–13; *Ib.*, 184, § 12; Duncan *a.* Duboys, 3 *J. C.*, 125.)

Every bill which has been passed by the Legislature, as provided by the constitution and statutes, and been approved and signed by the governor, or which he shall not return with objections within the prescribed period, or which, if returned with objections, shall be agreed to by the requisite number of each house, thereupon becomes a law, within the meaning of section 426 of the Code, whether it affects all the people of the State alike, or merely creates a body politic.

II. The court charged the jury that, "If you shall find the al-

* Present, Bosworth, Ch. J., and Mosorief and White, JJ.

legations of an intent to hinder, delay, or defraud the creditors of Persse & Brooks to be unproved, then there is no such defect or vice in the proceedings taken to organize the corporation, as creates any answer to the plaintiff's action;" that "if the plaintiff's right to recover in this action depended solely on the question, whether in organizing the company there has been such a compliance with the requirements of the charter, as confers upon the corporation a capacity to acquire and hold property, and to sue and be sued, the plaintiff would be entitled to your verdict."

The defendant excepted to the portion of the charge last quoted, but not to the part first cited, and requested the court to charge that "the stock of the corporation was never subscribed for and taken up, so as to satisfy the conditions of the charter, and so the corporation never had a legal existence, entitling it to purchase property;" and also, that "upon the proofs as to the taking of stock, and compliance with the conditions of the charter, the plaintiff has no right to maintain this action." The court refused to charge conformably to either of these requests, and the defendant excepted.

By the first section of the act, D. Persse, H. Brooks, and D. H. Magie, with all others who are or shall thereafter be associated with them, "be, and hereby are, with their successors and assigns, made and established a body politic and corporate."

By the third section, the first meeting of the corporation was to be called by a person or persons appointed for that purpose by the corporators named in the first section, and upon such notice thereof as they "shall deem reasonable and proper."

The second section declares, that "said corporation may organize, go into operation, and commence business, whenever, and as soon as three hundred thousand dollars of said stock shall be taken up and subscribed for."

A meeting was called and held at the place designated, on the 1st of August, 1857; subscriptions to the amount of $450,000 were made; officers were elected, and a certificate of the fact of such organization was filed forthwith with the town clerk of the town of Windsor Locks, and with the secretary of State on the 3d of August, 1857.

The words "taken up," found in the concluding sentence of section two, are not used as synonymous with *paid for;* for by

section seven, the subscriptions might be called in by instalments.

A subscription for $300,000 of the stock, the election of officers, and filing of the certificate, would complete an organization which authorized the corporation to commence business. (Schenectady and Saratoga Plankroad Co. *a.* Thatcher, 1 *Kern.*, 102.)

It has since continued to transact business, as a corporation, in the State of Connecticut. At least the evidence tends to show that it has, and no contrary inference from the evidence is admissible.

If the corporators so abused their powers in respect of the notice given of the first meeting, or by reason of any informality in the proceedings of that meeting, or by reason of taking property instead of money in payment of the subscriptions for stock then made, as thereby to make a cause of forfeiture, the matter cannot be taken advantage of collaterally or incidentally, or on any other mode than by a direct proceeding against the corporation for that purpose. And such a proceeding must be instituted in the State which created the corporation, and in which it is located. (Trustees of Vernon *a.* Hills, 6 *Cow.*, 23; Slee *a.* Bloom, 5 *Johns. Ch. R.*, 379, 380; Chester Glass Co. *a.* Dewey, 16 *Mass.*, 94; Willard's Real Estate, 101, 102.)

Brouwer *a.* Appleby (1 *Sandf.*, 158) is an authority that the alleged defects could not be raised even against a domestic corporation in a suit against one dealing with it as a corporation. It would seem to be equally clear, that a trespasser, sued for wrongfully taking property from its possession, would not be in a more favorable position. And the defendant must be viewed as appearing in the latter character, in determining the accuracy of the instruction.

Upon the question, whether the creation of the corporation was a fraudulent scheme to shield the property of Persse & Brooks from their creditors, all the circumstances proved in relation to the manner of its organization were allowed to go to the jury, and some of the more prominent of them were specially called to their attention in the charge given.

With reference to the part of the charge above excepted to, and the request to charge, see also The Bank of Niagara *a.* Johnson (8 *Wend.*, 645); The People *a.* The President, &c., of

the Manhattan Co. (9 *Ib.*, 351, 382); United States Bank *a.* Stearns (15 *Ib.*, 314); Methodist Episcopal Union Church *a.* Pickett (19 *N. Y.*, 482); Robinson *a.* The Governors of the London Hospital (21 *Eng. L. & Eq. R.*, 371).

The exception to this part of the charge is not well taken.

If the views already expressed, in relation to the sufficiency of the proof of the act of incorporation, and the effect of the acts done to organize the company, are correct, it was not error to refuse to dismiss the complaint, when the plaintiffs rested, unless the third, fourth, fifth, and sixth requests to charge, or one of them, should have been complied with. Those requests, and the matter of the charge in respect to them, will be considered in connection with the exceptions to the charge not already considered.

III. The third to the eleventh of the appellant's points, inclusive, relate to exceptions admitting or rejecting evidence.

To determine the accuracy of some of these rulings, it is important to bear in mind the theory of the defence, and the evidence that had been given when the question arose; and as to others, the line of examination, which had been previously pursued.

The theory of the defence sought to be established was, that the incorporation of the plaintiffs was a scheme devised by Persse & Brooks to convert their property into a form which would hinder, delay, or defraud their creditors, and with that intent, and by which they would be enabled to control it as officers and agents of such corporation; and that the transfers made in August and September were made with that intent, and necessarily had that effect.

Evidence of the acts of the assignor of property who continues in actual possession of it after the transfer, respecting his manner of using or disposing of it, tending to show that he is using and disposing of it as if it were his own, is admissible upon the question of the *bona fides* of the transfer.

So, too, are his declarations relating to its control and the disposition of it, while he continues in the actual possession, where such declarations, in connection with the use or disposition which they authorize, tend to establish the same result. (Adams *a.* Davidson, 10 *N. Y.*, 309.)

Such a rule does not conflict with the statutory provision,

that "in suits by or against an aggregate corporation, the admission of any member thereof not named on the record as a party to such suit, shall not be received as evidence against such corporation, unless such admission was made concerning some transaction, in which such member was the authorized agent of such corporation." (2 *Rev. Stat.*, 407, § 80.)

Nor is it an answer, that the person whose declarations are sought to be proved, in the present case, was in possession as an officer of a corporation, and that his possession is its possession, and the case does not, therefore, fall within the rule. That is objecting to the exclusion of the offered evidence, the very fact in dispute, and is no more an answer than if his assignee were a natural person. When it appears that his possession is that of an officer, and *bona fide* as such, the question is solved, in so far as its solution depends merely upon the fact of a continued possession. But whether he uses it, and deals in regard to it, as if it were his own, is an entirely different matter.

Booth *a.* Bunce *et al.* (24 *N. Y.*, 592) is an authority for the proposition, that it is open to the defendant to establish his defence if he can; and it would seem that the same rules of evidence must be applied, as if the assignee or vendee were a natural person; having at all times a due regard for the proposition that a corporation can, generally, act only by the agency of natural persons.

We think it quite clear, therefore, that it was competent for the defendant to prove that Horace Brooks, and Mr. Forrest, the assignee of his firm, immediately after the assignment was executed, went to Windsor Locks; and that Forrest, in the presence of Mr. Barnes, and of H. Brooks, and T. B. Persse, gave the directions and made the statement offered to be proved; and that such instruction was obeyed. Horace Brooks was the president of the plaintiff; was the principal actor in taking the steps pursued to organize the company, and seems substantially to have been the officer most influential in conducting its operations. The rejected evidence, if it came up to the offer, would show that even after the assignment he subjected it to the control of the assignee, as property transferred by the assignment.

Whether such proof as was offered could have been made, or would have been credited if given, are not questions now

before the court. We must assume it would have been given but for the ruling excepted to, and may have been fully credited.

For the same reason, evidence of the declarations of H. Brooks, offered to be proved by Zebley, should have been admitted, if made while he was in the possession of, and controlling the property, now claimed to belong to the plaintiff.

So, too, I think the evidence offered to be given by J. H. Benedict should have been received. The evidence was to show what Mr. Persse said, while negotiating for the purchase of stock to be manufactured into paper, at the plaintiff's mills. Though the offer does not specify the statements alleged to have been made, yet it should not be now assumed that it was overruled for that cause; especially as it appears that offered evidence, in all respects very specific in respect to the facts proposed to be proved, was excluded.

It is hardly necessary to state, by way of precaution, that all declarations which either Persse or Brooks may have made are not admissible, merely because they made them and they relate to the business and property now claimed by the plaintiff to be its own business and property, and were made while in possession of the property and conducting the business. To be admissible, they must have been relevant to the issue.

Whether Benedict observed any change, during the year 1857, in the manner of doing business, or the appearance of the store, I do not deem admissible. If he transacted business with Persse & Brooks during that time, and if they then transacted in their own names the business, which the plaintiff now claims was its business; or if he saw that the signs on the store, or other indicia of ownership continued unchanged, he could so testify.

Before the exceptions were taken to H. Brooks' testifying to the fact that, anterior to the creating of the corporation, he conversed on the subject of forming it; and what was his reason for forming it; and whether or not there was any motive to defraud creditors; he had stated without objection, that the first design of forming it was talked of between Persse and himself; and he had talked with Mr. Dexter about it; that he had spoken to a great many people on the subject; and in the parlor of the Nassau Bank among the directors. He had also

been examined, by the defendant (on a cross-examination), as to the meeting to organize the corporation; the call of that meeting, and how made; as to the transfers of property made on the 1st of August and 1st of September, and as to the conduct of Persse & Brooks in regard to the property and the management of the business down to a period subsequent to their failure.

The evidence given did not tend to show any very general or circulated notice of holding the first meeting; and this, in connection with the fact that Persse & Brooks continued the manufacturing business on their own account, down to the 1st of September, 1857, furnished the basis for an argument that the fact of the organization was not generally known nor designed to be; and that their continuance of the business for a month subsequently, was calculated, if not designed, to prevent any inference being generally drawn that they had ceased to be owners of the mills.

As pertinent to that question, it appeared to me at the trial to be proper, and does still, to admit evidence that the formation of the company was publicly spoken of by them, and to persons with whom they were dealing.

And as the evidence then given, had there been no other, would have required the submission to the jury whether the plaintiffs had been incorporated as a cover and shield, to defraud, hinder, or delay the creditors of the firm of Persse & Brooks,—and as such evidence had been given by H. Brooks himself,—the question whether this was done, and the property transferred, with a fraudulent intent, was one proper to be put on a re-examination (which as to this matter was a cross-examination, under the decision in Seymour *a.* Wilson, 14 *N. Y.*, 567).

If that general question, under such circumstances, is competent and proper for the consideration of the jury, it is difficult to perceive any objection to his stating what the actual motive or intent was. He is as competent to know and to state that, as to affirm generally that his intent was honest and not fraudulent. If the motives or reasons assigned evince an honest intent, the statement of them is but specifying the reasons for his acts, which the answer to the general question of intent characterizes as being an honest intent. And if he may testify that his intent was honest, or, as an equivalent thing (when

showing an honest intent), may state the particular reasons which induced the act, it would seem to follow that he may also testify that he communicated these reasons to his creditors and others before the act of incorporation was applied for.

It may be conceded that such matters would not be competent evidence in the first instance, and yet may be upon the question whether the organization was designedly concealed at the time it took place, or whether the act of incorporation was procured and the transfers made with an actual intent to defraud, in answer to evidence by the same witness of acts on his part tending in any degree to justify an inference of such an intent to conceal and defraud.

H. Brooks was permitted to testify, that between the 1st of September, 1857, and the 1st of July, 1858, the corporation made profits; and that there was a very great panic in the market, beginning in July or August, and lasting several months; and the defendant objected and excepted to the decision admitting the evidence.

The first item of evidence, if admissible at all, can only be so because it bears on the question whether Persse & Brooks obtained the charter in contemplation of insolvency, and with a view to their immediate failure. The second item of evidence bears upon the question of the cause of their failure; and whether it resulted from an actually embarrassed condition of which they were conscious, and against the consequences of which they ought to provide when they organized the company, or was induced wholly or in part from causes not then within their contemplation.

But it does not follow that the admission or admissibility of such evidence makes it competent to inquire whether, up to the time of the trial (March, 1862), profits had been made. Merchandise of the plaintiff, or claimed to be such, had been seized in March, 1858, by creditors of Persse & Brooks, amounting in value to some $11,000 to $12,000, on an allegation that the formation of the corporation was a cheat and a fraud, and that the property it claimed to own was liable to be seized on execution issued on judgments in favor of the creditors of Persse & Brooks, and had been sold notwithstanding notice of the plaintiff's claim of ownership. Such acts would necessarily interfere with the successful transaction of the plain-

tiff's business, tend to impair its credit, and would leave the jury without any reasonably certain means of determining what would have been the result of the business if it had not been interfered with.

The evidence offered and rejected neither furnishes any evidence of an original fraudulent intent, nor impairs in any degree whatever weight the rebutting evidence, as to making profits up to July, 1858, may justly deserve.

The defendant was permitted to inquire whether profits were made within the period of which H. Brooks testified; and the evidence excluded was, whether profits had been made up to the time of the trial. It was not proposed to inquire with reference to any intermediate point of time; and if that was desired it should have been so stated, that it might have been considered whether, upon any grounds that might have been suggested, such an inquiry would have been pertinent. But we think that all evidence in respect to the fact of making profits up to July, 1858, or sustaining losses subsequently, should have been excluded. That the corporation made profits, does not tend to show that its organization was without fraud; that it suffered losses, does not tend to show that its organization was fraudulent.

The exception to the ruling that H. Brooks may state any thing which the parties said in negotiating the agreement by parol, and which of itself constituted the contract, is not tenable. Such evidence was in its nature clearly competent; and it was a matter resting in the discretion of the court, in its view of what was proper to elicit the whole truth, to permit the inquiry, although the witness had previously been examined to the same matter.

The question to Mickle, "Was you superintendent of the works under the corporation?" was clearly competent. This was put on his cross-examination. He had testified on his direct examination that he was in the employment of the firm of Persse & Brooks, "as superintendent of the manufacture of paper at Windsor Lock, from the spring of 1855 to the end of October, 1857."

This fact, if true, was in itself very material, and tended to show that the manufacture of paper was continued by the firm, under the superintendence of a person employed by the firm,

to the end of October, 1857. It was clearly competent for the plaintiffs to show, if they could, that from September 1, 1857, he acted as the agent of the corporation.

The defendant asked H. R. Dixon, who was examined as an expert in the science of book-keeping, this question:

"Do the books (of Persse & Brooks) show whether, on the 30th of June, 1857, the firm was insolvent?"

The court excluded the question, and the defendant excepted.

It was competent to show the entries in the books in respect to the firm's assets and liabilities, and it was for the jury to determine upon the whole evidence whether the firm was insolvent. The witness was asked to determine the question upon such evidence as the book-entries furnished, instead of pointing out the entries and reading them to the jury. This exception is untenable.

The defendant also excepted to the exclusion of evidence of the contents of an entry made in the firm's books in October, 1857. At this time the books were under the control of the firm's assignee and his agents, and the entries were not the acts of Persse & Brooks.

Any entries made by Brooks himself, the defendant was permitted to prove. This ruling is free from objection.

The questions as to what the paper of the firm, without their knowledge, was offered to be sold for in the spring or summer of 1857, or whether Mr. Bennett was induced to withdraw his funds in their hands in consequence of an offer to sell him the firm's paper made in March, 1857, were properly overruled. The evidence, if given, would not tend to show that the firm contemplated insolvency as probable or possible, or had disposed of its property to the plaintiff fraudulently.

Nor do I think evidence should have been received of the application which Mr. Bennett made of the $20,000, which he received from the firm.

The fact that he or any other person called for payment, in whole or in part, of money lent on interest, and payable at call, raises no inference that the debtor was insolvent, or embarrassed, or considered himself to be so, and laid no foundation for evidence of the use which the creditor made of the money, on receiving it.

I do not see any good objection to proof of the manner in

which the transactions between Bennett and the firm were finally closed. If any of the testimony on behalf of the defendant in relation to these transactions can be supposed to furnish any evidence of the fraudulent intent imputed to Persse & Brooks, the whole truth in relation to the true character of these transactions would seem to be pertinent.

A short answer to the exceptions is, that in the answer to the question, "Were any papers exchanged between you and any other person in reference to that payment?" and in answer to the further question, "Was the final settlement made between you and Seymour, and Persse & Brooks, and Forrest or Mr. Eaton representing them?" nothing was said, of the slightest consequence, or which by any probability could have had any influence on the verdict.

The whole evidence of the witness, according to my view of it, renders the questions admissible, as a reasonable cross-examination.

The question put to Zebley, whether he knew from Persse & Brooks, that the notes made by them in July or August, 1857, were issued by them to be sold, should not have been overruled, if such knowledge was acquired before the transfers made by them of the property in question. It would bear on the question of their then opinion of their financial condition, but might be entitled to but little weight, if the rates at which a sale was authorized were such as were paid for the paper of houses in good credit.

If made after the transfers, they would be declarations in no way characterizing their possession of the transferred property, and should not be admitted against the plaintiffs to affect a title they had previously acquired.

The defendant, without objection, was permitted to examine Messrs. F. Bacon and C. S. Delavan, as to the general credit of Persse & Brooks, but was not allowed to prove "what their (Persse & Brooks') paper would sell for in the market," or that the notes of the firm were brought into Delavan's office, and offered for sale by street brokers; or whether "the fact that the paper of a house is in the hands of street brokers frequently for sale, affects the character of that house;" and he excepted to the decisions excluding such evidence.

I think the evidence is too remote, and does not legitimately

tend to show either that the firm was embarrassed when the corporation was organized, or that they then contemplated a failure. The fact that the paper was in the hands of street brokers, *prima facie*, tends rather to show the wants of the holder than of the makers of it.

Delavan was out of the country from the 17th of May to the 5th of October, 1857, and if the question related to a period later than the 5th of October, the offered evidence would clearly be inadmissible.

It was not proposed to show that the firm knew of the suggested sales, or offers to sell, or had any difficulty in procuring on credit any amount it desired in its operations.

The declarations of Persse & Brooks, whether oral, or in the form of a sworn answer, made February 13, 1858, to the effect that the notes therein mentioned were made by the firm to raise money, and were discounted at usurious rates, I deem inadmissible. The plaintiffs' title cannot be affected by mere declarations made by their vendors, subsequent to their purchase, when not made in relation to the transferred property at the time in their possession, or in any way qualifying such possession.

None other of the exceptions taken to the admission or rejection of evidence are noticed in the appellant's points.

IV. It only remains to consider the exceptions to refusals to charge as requested, and to the charge made. The first and second requests to charge have already been disposed of; the third, fourth, and fifth requests relate to the legal effect of the transfers made to the corporation, and taking stock in the individual names of the partners.

I think the charge made in answer to these requests, was a correct exposition of the law. The mere fact that partnership property is transferred for other property, and the substituted property transferred to the members of the firm individually, is not *per se* fraudulent, nor conclusive evidence of an intent to hinder or delay the creditors of the firm in the collection of their debts. If the substituted property is as valuable as that sold, is as accessible to process, and can be as readily converted into money, by judicial proceedings, the transaction does not, of itself and alone, either in fact hinder or delay, or furnish conclusive evidence of an intent to hinder or delay creditors, or render the transfer *per se* fraudulent and void.

The fact that title to the substituted property was taken by the members of the firm in severalty, instead of the firm's name, may be an important circumstance, if there be any other evidence tending to show a fraudulent intent. But if there be no evidence of a fraudulent intent, except such as is furnished by the mere fact of a transfer of a firm's property, and the division in form, among the partners, of property taken in exchange, the transaction is not *per se* fraudulent.

If the firm's remaining assets had been abundantly sufficient to satisfy all its liabilities as they matured, I cannot think that a transfer of property of the value of that in question, and taking the stock of a corporation therefor, in which corporation the transferred property was converted into capital, would suggest the idea, that there could possibly be in the transaction any evidence of an intent to hinder, delay, or defraud.

If this be so, then it was correct to refuse to give the instructions sought, and the charge, as made, was just and proper.

Because the requests affirm, that the naked fact of the transfer and taking the stock in the individual names of the partners was fraudulent.

That it was important and material, in connection with the other evidence, and entitled to be fully weighed by the jury in determining the question of an actual fraudulent intent, was pressed upon them by counsel, and it is among the leading facts relied on as evidence of frauds, which the court specially called to their attention.

And in this connection, it is appropriate to advert to the colloquy between the court and a juror, when the jury returned into court without having agreed on a verdict.

The only remark which I deem open to criticism, is that, "It must be something which interferes, *and* is done for the purpose of interfering with a party's ordinary remedy by suit to collect his debt."

Substituting *or* for *and*, and the sentence would be unobjectionable. The next sentence indicates that the court intended to so express itself. And the concluding sentence corroborates this view.

If there be nothing in the nature of the property taken in exchange, which would cause a delay in converting it by judi-

cial proceedings, or in creating a lien upon it thereby, the mere fact of the exchange would not furnish evidence of an intent to hinder or delay.

There may be a transfer with intent to hinder or delay, when the transaction itself would not have any such legal effect. And when such an intent is proved, the transfer is void, though the substituted property is as valuable, and as convertible by judicial proceedings as that given for it.

But when such a transfer is shown to have been made with intent to hinder or delay, the intent will be established by other evidence than the naked fact of a mere exchange of property.

V. The sixth and seventh requests to charge were properly overruled. The sixth assumes that it was a necessary effect of these transfers "to hinder, delay, and defraud their creditors." This fact was one for the jury to determine on the whole evidence. The jury were instructed that Persse & Brooks must be deemed to have "intended to produce such results as are the natural and necessary consequence of their acts; and if it can be seen that the natural and necessary consequence of the acts of Persse & Brooks in transferring property to the corporation, in the view they then had of their condition and resources, was to defraud, or hinder, or delay their creditors in collecting their debts, then they should be deemed to have done what they did do, with that intent, and the transfers would be void as to their creditors."

The request was erroneous, because it assumed as an established fact, a question of fact which was a matter of controversy, and in regard to which it was the exclusive province of the jury to determine whether it existed or not.

VI. The seventh request was also properly overruled. That imports, that though there was no fraudulent intent in organizing the corporation, yet a transfer to it of property by Persse & Brooks, and such possession of it as the lawful officers of the corporation would necessarily have in the proper performance of their official duties, would be presumptive evidence of a fraudulent intent, though they were in fact officers, and professed to hold and control it in that capacity, and did no act impeaching the truthfulness of their professions, or casting a suspicion upon the transaction beyond such as is justified by the fact of such a possession.

I think the charge, on this branch of the case, presented it accurately and fully to the jury.

VII. Our attention is called to a portion of the charge to which no exception was taken at the trial, and which, it is now urged, submitted to the jury a question which the case did not present, and in a manner calculated to mislead.

It is not urged, as I understand the argument, that the proposition is not sound as an abstract one. The court stated to the jury the requests to charge presented by either party, and the views of the court in regard to their accuracy as legal propositions.

The court had already informed the jury, that as Persse & Brooks "acted as well for the corporation in taking the transfers as for themselves in making them, it follows that if they were actuated with this fraudulent intent, the plaintiffs had notice of it, and cannot recover in this suit."

After stating the rule of law, the stating of which is now complained of, the court further said that, if the corporation was formed, and the transfers made with the intent alleged, "then the title is invalidated by transactions between Persse & Brooks and the corporation, had after its organization."

The full pertinency of this part of the charge cannot be so clearly seen as it would be, if the requests to charge were in the case. The words above quoted are there contained in one of the plaintiffs' requests, and the charge given was adverse to them.

I cannot think that counsel or the jury understood the judge to submit to the jury to find whether the transfers of the property may not have been honestly made, and therefore valid, even though they should find that the charter was obtained and the company organized with the fraudulent intent imputed.

If there were no error other than that suggested in stating to the jury the legal proposition to which this objection is made, I should be quite clear that the judgment should be affirmed.

But there are errors, before stated, which entitle the defendant to an order reversing the judgment, and to a new trial, with costs to abide the event.

Ordered accordingly.

HAMILTON *a.* BUTLER.

New York Superior Court; Special Term, November, 1865.

COSTS.—TRIAL.

Only five term-fees can be allowed, even where after they had accrued a new trial became necessary, and the cause was again on the calendar.

Where after trial the jury are discharged without rendering a verdict, and the cause is set down for another term, the second trial is not within the provisions of the Code allowing costs of subsequent proceedings before a new trial, where a new trial has been "granted."

The cost of copies of the stenographer's notes of the first trial, for the use of a party on a second trial, is not taxable as a disbursement.

A trial-fee is taxable whether the trial results in a verdict or not.

Where a cause is tried several times, a trial-fee for each is taxable.

Appeal from taxation of costs.

This action was by Jeremiah G. Hamilton against Wentworth S. Butler, to recover $550; and the defendant in his answer claimed $1,000 against the plaintiff.

The case was tried three times. On the first trial, after the evidence was all in, the justice discharged the jury on account of some misconduct on the part of one of the jurymen, and put the case off for the term.

On the second trial at the next term the jury failed to agree, and were discharged.

On the third trial the jury rendered a verdict for the defendant for $1,106.85, the amount claimed by him. The clerk having adjusted the costs, the defendant appealed to the court. The items in question are stated in the following points.

Ira D. Warren, for the defendant.—I. The clerk disallowed the $10 costs of the June term. The case was first tried in May, previous to which it had been on the calendar for five terms. After the trial in May, the justice holding the trial-

term set the case down for trial again in June. The case was necessarily on the day calendar for June term, and was not reached, and we therefore claim the term-fee of ten dollars for June.

II. The second item the clerk disallowed was $25 for all proceedings after notice and before the second trial; and also after the second and before the third.

Section 307 of the Code provides, "to either party where a new trial shall be had, for all proceedings before such new trial, &c., $25."

The Code defines a trial to be "a judicial examination of the issues between the parties." (*Code*, § 252.)

It is a new trial therefore every time it is "judicially examined," which was three times in this case, and we therefore claim $25 for the second and third trials.

III. The clerk disallowed any trial-fee except the last. The Code provides, section 307, "for every trial of an issue of fact, $30." Section 252 defines a trial to be "a judicial examination of the issues between the parties."

Therefore we say every time there is such a "judicial examination" it is a trial, and we are entitled to a trial-fee. (*Code*, 1860, 434, subd. 4, and cases; 4 *Duer*, 641; 4 *How. Pr.*, 465. 8 *Ib.*, 1, is a case in point; 2 *Tillinghast's Pr.*, 610; 6 *How. Pr.*, 465.)

IV. On the second trial the cause occupied three days; also on third trial; which, under section 307 of the Code, subdivision 4, entitled the defendant to $10 additional on each trial. This the clerk has disallowed, on the ground that there was but one trial.

V. We claim that we are entitled to the $13.50 and the $15 for copies of the reporter's notes of the evidence on the first and second trials.

The affidavits show that they were necessary and material in trying the cause the second and third time.

VI. We claim that the clerk erred in striking out the items in the bill of costs, and that the defendant is entitled to,

1st. The $10 for June term;

2d. A trial-fee on each of the trials;

3d. The subsequent proceedings before trial on each of the trials, either $25 or $15;

4th. To $10 extra on each trial, it occupying more than two days;

5th. To the items of disbursements for reporter's notes.

Wm. H. Anthon, for the plaintiff.

ROBERTSON, Ch. J.—This action has been three times tried. On the first trial the jury were discharged after all the evidence was admitted, on account of the misconduct of one of their number. On the second the jury disagreed. On the third they found a verdict for the defendant.

I do not find any provision of law for over five term-fees in any action. (*Code*, § 307, subd. 7.) The item in the defendant's bill of costs for an extra term-fee after the cause had been once tried was properly disallowed.

The provision of the (*Code*, § 307, subd. 4) for all proceedings before a new trial, only applies to cases where a new trial has been "granted," not to those where a trial has never been completed; both items in such bill, of costs of proceedings before a new trial, were properly disallowed.

The copies of the notes taken by the stenographer on the first two trials, although very useful, were not necessary disbursements under the 311th section of the Code. Any other notes would have answered the same purpose, and compensation to a private stenographer could not have been a necessary disbursement; even the cost of a copy for a judge is made the subject of a special provision. (*Code*, § 257.) The charge for such copies was therefore properly disallowed.

The Code defines a trial to be "a judicial examination of the issues between the parties." A trial without a verdict is still a trial, and the labor of counsel is equally great whether the jury agree or not. The opinion of Justice HARRIS in Ellsworth *a.* Gooding (4 *How. Pr.*, 4) seems to be very appropriate. Strictly speaking, when a new trial has been granted, the first trial is a nullity, and yet no special provision is made by law for a second trial-fee, although there is one for proceedings anew before such second trial. It may not, perhaps, be a matter of practical consequence to a counsel, as the court would give compensation by an extra allowance in case a cause was tried more than once, as a difficult and extraordinary one, and of course if

included in the adjustment of the costs, the court would give so much less compensation as an extra allowance. I think the items of $30 for trial-fees on the first and second, as well as the third trial, should have been allowed, and the bill of costs as adjusted must be reformed in that respect, and such charges allowed.

TOWLE *a.* JONES.

New York Superior Court; General Term, June, 1863.

PLEADING.—RELIEF LIMITED BY COMPLAINT.

Where an action is brought to obtain legal relief only, that relief being the recovery of money only, and the plaintiff upon the trial fails to establish a right to recover any thing upon legal grounds, the court cannot grant any equitable relief; for such relief cannot be deemed to be consistent with the case made by the complaint.

Thus, where vendors of real property sued the purchaser for breach of his contract to take the title, claiming to recover, not the amount of the purchase-money, but merely their damages by reason of his alleged failure to perform, and upon the trial before a justice of the court, a jury being waived, the plaintiffs failed to make out a right to recover any damages;—*Held*, that the court could not grant a judgment for specific performance in their favor, although upon the evidence they might have maintained an action for such relief. (ROBERTSON, J., dissented.)

This was an appeal from a judgment, entered in favor of the defendant, on a trial on the 10th to the 17th of January, 1862, before Mr. Justice MONELL, a jury having been waived by consent of the parties.

This action was brought by James F. Towle and Charles F. Rover, to recover damages from the defendant for the non-performance of a contract for the purchase of the unexpired term in certain leasehold premises, in the city of New York. The contract was in two parts, one signed by the plaintiffs, and the other by the defendant.

The contract signed by the defendant, which was substantially the same as that signed by the plaintiffs, was as follows:

New York, September 15, 1860.

This is to certify, that I, David Jones, have this day purchased of Towle and Rover, the lease and improvements on lot No. 202 Sixth-street, known and occupied by them as a stable and carriage repository, *free and clear of all encumbrances*, for seventy-five hundred dollars, twenty-five dollars of which the receipt I hereby acknowledge.

David Jones.

The plaintiffs averred and proved that, on the 26th day of March, 1861, they tendered to the defendant an assignment of the lease of the premises, which he declined to accept. The nature of the demand for relief is stated in the opinion of the Chief-justice.

The defendant in his answer insisted, as a defence, that the plaintiffs had not a good and valid title to the premises; and that the same were not free and clear of encumbrances, but were encumbered by judgments and assessments.

The justice before whom the cause was tried, found, among other things, that the plaintiffs' title was subject to encumbrances, which by their contract they were bound to remove; and that not having done so after notice, the defendant had a right to rescind the contract, and had rescinded it; and he ordered judgment for the defendant for his costs. He refused to find, as requested by the plaintiff's counsel, that the defendant had a right to retain out of the purchase-money sufficient to pay off the encumbrances.

The plaintiff excepted to his decision, and appealed from the judgment entered thereon.

C. H. Tracy, for the plaintiffs, appellants.—I. The special term erred in respect to there being encumbrances.

II. The several liens on the premises for the payment of sums of money, being much less than the consideration money of the sale, were no valid objection to the assignment of the lease; the vendor being entitled to accept the property, and

then to withhold or apply from the purchase-money the necessary sums to pay off such liens. (*Dart on Vendors*, 281–283, 381; Fagen *a.* Davison, 2 *Duer*, 153; Holmes *a.* Holmes, 5 *Seld.*, 525.)

III. The defendant having never applied for a conveyance, he has never put the plaintiffs in default. He cannot now object that there was any defect in the title, which defect has been supplied since the commencement of the suit. (3 *Starkie's Evidence*, 1610, "*Vendor and Vendee;*" Todd *a.* Hoggart, 1 *Moody & Malkin*, 128; Thomson *a.* Miles, 1 *Espinasse's Cases*, 184.)

IV. There was no valid or effectual rescission of the contract by the defendant.

V. The plaintiffs have a clear and meritorious cause of action.

The bargain was made in the simplest form. The arrangement about possession and occupation was in conformity with the contract, and suited to the mutual convenience of the parties. The defendant thus had use of the premises for several months; the plaintiffs sacrificed their business to prepare to give up full possession; and when the market value of the lease fell off, the defendant sought to escape from the bargain upon the pretence of a trifling encumbrance, which he could at once discharge out the purchase-money.

P. G. Clark, for the defendant, respondent.—I. Assuming that the contract of sale was valid and binding upon the respective parties, no time being fixed for its performance, each party was bound to perform within a reasonable time. (Atwood *a.* Cobb, 16 *Pickering's Rep.*, 227; *Chitty on Contract*, 625, and cases cited.)

II. The plaintiffs did not perform, or offer to perform, within a reasonable time, and the defendant was justified in refusing the assignment, and the plaintiffs are not entitled to recover.

What is a reasonable time is a question of fact. (*Story on Contract*, 1 ed., 405, § 665.)

III. At the time of the making of the contract, and at the time defendant gave notice that he should decline completing the purchase, there were encumbrances.

IV. By the terms of the contract, the plaintiffs were to transfer the term free and clear of all encumbrances.

V. To entitle the plaintiffs to recover, they were bound to prove that they could, within a reasonable time after the making of the contract, transfer a good title to the premises, that they offered to do so, and at the time of the offer the premises were free and clear of all encumbrances.

They failed in every particular, and the judgment in favor of the defendant should be affirmed. (Morange *a.* Morris, 34 *Barb.*, 311.)

By the Court.*—Bosworth, Ch. J.—Unless in an action for the recovery of money only, brought upon a contract to purchase and take a conveyance of real estate, and brought to recover damages specially stated in the complaint, but not to recover any part of the purchase-money, a plaintiff may have a judgment for specific performance, although he fails to establish a right to recover any part of the moneys for which judgment is prayed; the judgment appealed from in this case must be affirmed.

The Code provides that certain actions shall be tried by a jury, and that all other actions are triable by the court. (§§ 253 and 254.) Those now required to be tried by a jury, were formerly known as actions at law; and those triable by the court, as equity suits.

Section 253 declares that an issue of fact in an action for the recovery of money only, . . . must be tried by a jury, &c. What is the test, by which it is to be determined whether an action is for the recovery of money only?

When the action arises on contract, and is for the recovery of money only, the summons must state that the plaintiff will take judgment for a sum specified therein. The summons in this case states that judgment will be taken for a sum named therein. The complaint states a contract between the parties by which the plaintiffs were to sell, and the defendant to purchase, an unencumbered leasehold property for the sum of $7,500; payment of $25 of the purchase-money; that defendant took possession; a tender of an assignment of the lease, and defendant's refusal to accept it or to perform the agreement on

* Present, Bosworth, Ch. J., Robertson and Barbour, JJ.

his part; a sale of other property by the plaintiffs, in consequence of the making of this contract, at a loss of $300, and of still other property at a loss of $500; a loss of the use of other property to the amount of $200; and, generally, that the plaintiffs "sustained damages in consequence of the said defendant refusing to perform his said contract, to the sum of $5,000 over and above the use and occupation of the building," alleged to be worth $150. Wherefore the plaintiffs "demand judgment against the defendant for the sum of $5,150 damages, besides the costs and disbursements of the action."

The Code (§ 142) requires that a complaint contain "a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

The summons shows the action to be one on contract, and for the recovery of money only. The complaint states a cause of action arising on contract, and demands no relief, except the recovery of money. The sum demanded is only $5,150, while the amount of purchase-money remaining unpaid is $7,475. Of the $5,150 claimed, $150 is for the use by the defendant of the leasehold premises.

If, therefore, the plaintiffs could recover for such causes of damages as they specify, a recovery for them only would leave them without a verdict for any part of the purchase-money; and payment by the defendant of the sum recovered would not confer on him any right to an assignment of the lease; for the reason that it would not include any part of the purchase-money. And it was evidently the view and intent of the pleader who drew the complaint, that the recovery of damages, of the nature and on the grounds therein stated, would leave the plaintiffs the owners of the lease, and freed from obligation to transfer it to the defendant.

This view and intent are manifest from the fact that there is no prayer for judgment for the unpaid purchase-money. Judgment is prayed for $5,150; and the claims composing that sum do not include any part of the purchase-money; the part of it unpaid being $7,450, or $2,300 more than the amount sought to be recovered. The allegations of the complaint, therefore, not only do not attempt to make a case for the recovery of the purchase-money, but it could not be recovered,

even if the allegations of the complaint made a case for it, without amending the summons and prayer for relief, in respect to the sum demanded. These plaintiffs no more seek, on the case made, a recovery of the purchase-money, than would a vendor of personal property deliverable at a future day, who should sue, alleging a breach of the purchaser's contract in his refusal to take and pay, and claim as damages the difference between the contract price and the market value, on the day the contract should have been performed.

The action was noticed for trial as a jury cause, and was tried by the court only because a jury trial was waived. Had it been tried by a jury, the verdict, if for the plaintiffs, would have been for money only, and for such sum as upon the evidence and under the law, as charged by the court, the jury thought the damages amounted to. The jury have in such a case an absolute right to render a general verdict, though they may be required to "find upon particular questions of fact to be stated in writing." (*Code*, § 261.) The clerk must enter judgment in conformity with the verdict (§ 264), unless the case be reserved for argument or further consideration.

The only relief the defendant can have, if the verdict be against him, is a new trial, if there were errors in the trial; if he has no right to a new trial, judgment follows upon the verdict and in conformity with it, as a matter of course. (§§ 264, 265.) It is, of course, conceded, that if the defendant alleged and proved facts, entitling himself to relief on equitable principles against the plaintiffs' strictly legal rights, it would be granted to him, in the judgment to be rendered. But this fact does not aid a solution of the question, what is the case made by the complaint? and what is the extent of the relief grantable to the plaintiffs thereupon?

In this action, if the plaintiffs recover $50 or more, they recover costs as a matter of course (§ 304, subd. 4), and if they fail to recover any thing, the defendant recovers costs (§ 305); whereas, if it could be treated as an action in which equitable relief might be given, the costs of it would be in the discretion of the court. (§ 306.)

A plaintiff on a given state of facts may not be able to recover at law (or as legal relief to which he is entitled), either the purchase-money, or any damages for a refusal to take a

deed, and yet may have a right to a decree for a specific performance. If he had not the title when the action was brought, or if the contract was void by the Statute of Frauds, he could not at law recover the purchase-money, even though there was part performance of the contract; while in case of part performance, if he could make a good title at the trial, he might have a decree for a specific performance. (3 *Rev. Stat.*, 5 ed., 221, § 10; Lowry *a.* Tew, 3 *Barb. Ch.*, 407; 4 *Comst.*, 403.)

The plaintiffs having made a case for the recovery of legal relief only, and having brought their action to obtain legal relief only—viz., to recover money only—and having failed to establish a right to any part of the relief prayed, they are not at liberty to say, on an appeal from the judgment, that the facts found entitle them to equitable relief, and that the judgment should be reversed, because equitable relief was not granted. (Cole *a.* Reynolds, 18 *N. Y.*, 74; Wood *a.* Wood, 26 *Barb.*, 356; Stevenson *a.* Buxton, 8 *Abbotts' Pr.*, 414; N. Y. Ice Co. *a.* Northwestern Ins. Co., 23 *N. Y.*, 357, 360.)

No case has been cited, and none has fallen under my observation, where, in an action on contract brought to recover money only, and where the plaintiff failed to establish a right to recover any thing on legal grounds, equitable relief has been granted to him upon the trial.

Section 275 does not aid the plaintiffs. Where an action is brought to obtain legal relief only, and that relief is a recovery of money only, the granting of equitable relief is not consistent with the case made by the complaint.

To enable the court to grant equitable relief, and in order that the granting of it may be consistent with the case made by the complaint, the action must be brought to obtain such relief, wholly or in part; and whether it is so brought must be determined by the tests provided by the Code.

In a suit brought to obtain equitable as well as legal relief, it is consistent with the case made by the complaint to grant legal relief, though equitable relief be denied, where enough of the allegations contained in the complaint and embraced within the issue, to entitle the plaintiff to legal relief, are established at the trial. (Marquat *a.* Marquat, 2 *Kern.*, 336; Bidwell *a.* The Astor Mut. Ins. Co., 16 *N. Y.*, 263; The N. Y. Ice Co.

a. The Northwestern Ins. Co., 23 *N. Y.*, 357; See *a.* Partridge, 2 *Duer*, 463.)

Actions to obtain legal relief only, and actions to obtain equitable relief, or both equitable and legal relief, are contradistinguished throughout the Code. The summons may be, and in some cases must be different; the former must be tried by a jury; and without some special order, the latter cannot be tried by a jury. In the former, the recovery of costs by the prevailing party is a matter of strict right; in the latter, the court may impose them upon either party, as it deems justice requires.

The present case, viewed in the light of every test contained in the Code, is an action for the recovery of money only, or for legal relief only; on the facts found, no action at law would lie, and the plaintiff would not be entitled to recover any thing.

The premises were encumbered when this suit was brought, and continued to be at the time of the trial. The defendant, by the contract, was to have "the lease and improvements, free and clear of all encumbrances;" the plaintiffs never tendered such a title, and whatever title they had was subject to encumbrances. If the cause had been tried before a jury, it would have been the duty of the court to nonsuit the plaintiffs.

The judgment should be affirmed.

Barbour, J., concurred in this opinion.

Robertson, J. (dissenting).—The first question which this case presents, is whether the evidence on the trial would establish the right of the plaintiffs to recover in some form of action, or by some course of proceeding. The next is, whether, if it does, they have by any act or omission, or proceeding of theirs in this action, precluded themselves from obtaining any relief in it. That depends for its solution again on another point; whether the failure of the plaintiffs to establish a cause of action at common law, by proof of a written contract, and the tender of a proper conveyance of a good title at the time required by such contract, deprives them of all redress in this action, although they may have proved an oral contract, of

which time was not of the essence, and acts of performance sufficient to take it out of the Statute of Frauds—in other words, have shown a cause of action recognizable formerly in equity alone. (Baldwin *a.* Palmer, 10 *N. Y.*, 232.)

The learned judge before whom the issues in this action were tried, has found that the contract was in writing. The only evidence to sustain that finding is the instrument of September, 1860. That instrument does not in terms define with sufficient certainty the subject-matter, to entitle it to be enforced. "The" lease is no more definite than "a" lease. Extrinsic evidence must be had recourse to, in order to explain it. The mere fact that the plaintiffs had a lease, does not establish it to have been what they meant to assign (Price *a.* Griffith, 1 *De G., M. & G.*, 80; Stewart *a.* Alliston, 1 *Merivale*, 26, 33; Kennedy *a.* Lee, 3 *Ib.*, 441, 451); and parole evidence is inadmissible to explain the intentions of the parties. If the subject-matter had been properly described, it would have operated as a conveyance *in presenti*, there being no provision for a future one, or any contingency to occur to give it effect. (Jackson *a.* Myers, 3 *J. R.*, 388; The Same *a.* Clark, 3 *Ib.*, 424; Ives *a.* Ives, 13 *Ib.*, 235; Jackson *a.* Moncrief, 5 *Wend.*, 26.) A sealed instrument was unnecessary. (De Fonclear *a.* Shottenkirk, 3 *J. R.*, 170; Holliday *a.* Marshall, 7 *J. R.*, 211.) The word *agree* does not interfere with this (Emery *a.* Hitchcock, 12 *Wend.*, 156), even in the past tense. (Jackson *a.* Fish, 10 *J. R.*, 456.) It must, therefore, be assumed, in order to test the plaintiffs' right to any relief, that in this case there was no written contract established; but there was evidence of an oral one partly performed, so as to furnish the plaintiffs with an equitable cause of action. (Sutherland *a.* Briggs, 1 *Hare*, 26; E. India Co. *a.* Nuthumbadoo Mooddelly, 7 *Moo., P. C. C.*, 482, 497; Lane *a.* Newdigate, 10 *Ves.*, 192.) So far as the recovery of the purchase-money of the contract is concerned, the plaintiffs are only entitled to it, in this action, in case they have not debarred themselves from it by their pleadings and proceedings therein.

The complaint alleges the making of the contract for the sale and purchase of a lease and buildings at a certain price, and the tender of an assignment of such lease more than six months after the making of such contract. If a sale, without fixing any time for its consummation, implies in law a conveyance at

a reasonable time, as it probably does (Thomas *a.* Dickinson, 12 *N. Y.* (2 *Kern.*), 364), the period, at the end of which such tender was made, was not, *in law*, unreasonable. The complaint contains, therefore, facts showing a good equitable cause of action to recover the purchase-money (Clifford *a.* Turrell, 1 *Yo. & Col.* (*Ch. C.*), 138, 150; Walker *a.* Eastern Counties R. R. Co., 6 *Hare*, 594; Kenny *a.* Wexham, 6 *Mad.*, 355). Besides these, it alleges that in consequence of such contract being made, they sold certain horses, carriages, and harness at a loss of certain sums, and retained certain others unemployed, at the loss of a certain other sum, amounting in all to a thousand dollars; but it does not aver that these damages were inflicted by any refusal to perform the contract, nor does it in any way connect such damages with the making of the contract, of which they were certainly not the necessary consequence. It does not claim such losses as part of the damages resulting from all the facts stated in the complaint, and does not ask to recover for them. The complaint, however, also alleges that the plaintiffs sustained damages, by the defendant's refusing to perform the contract, to the sum of five thousand dollars, over and above the value of the use and occupation of the building by the defendant. The plaintiffs claim to recover, also, a certain sum for such use and occupation. The demand for relief asks for judgment for that sum, added to the five thousand dollars. It is very clear that the plaintiffs could not recover the value of such use and occupation, in addition to the purchase-money, except during the time within which they were not bound to deliver a conveyance. The action for use and occupation would necessarily be one at common law; but this would not prevent its being joined with one of an equitable kind (§ 167).

The defendant, having answered, has entitled the plaintiffs to obtain any relief consistent with the case made by the complaint, and embraced within the issue. (*Code*, § 275.) The objection of the unsuitableness of the relief asked in the complaint to the case made, cannot be taken even by demurrer (Andrews *a.* Shaffer, 12 *How. Pr.*, 443); and, therefore, after answer, it has been held that the demand for relief becomes immaterial (Marquat *a.* Marquat, 12 *N. Y.*, 341); and although that was said in an action for an equitable cause, I am at a loss to

understand any reason for a distinction in principle, if it had been purely legal.

In order, therefore, to deprive the plaintiffs of their right to recover the purchase-money of the contract in question, if it be only an oral one, and, taken out of the Statute of Frauds by part performance, time be not part of its essence, and they are able to convey a good title, and their case, therefore, an equitable case, one of two legal principles must prevail: either that the Code recognizes a distinction between causes of action formerly cognizable only in a court of law, and those redressed in a court of equity, or between the natures of the remedies sought in either case; and establishes some mode of determining which kind of suit the particular action has become, by either the pleadings or proceedings in it; or else that it provides some means for determining in what actions money alone is sought to be recovered, and in what other relief, and prevents a party, after he has commenced his action, from ever changing the remedy he requests.

The Code not only declares, in its preamble, the expediency of abolishing existing forms of actions and pleadings in cases at common law, discontinuing the distinction between legal and equitable remedies, and establishing a uniform course of proceeding in all cases, but it obliterates all the landmarks, and confuses all the boundaries between legal and equitable causes of action, modes of proceeding, and relief. The sturdiest stickler for those nice distinctions must yield to the judgment of the court of highest resort, in the case of The N. Y. Ice Co. *a.* The Northwestern Ins. Co. (23 *N. Y.*, 360), in which Justice Comstock, who had doubted the constitutional power of the Legislature to abrogate such distinctions, in the prior case of Reubens *a.* Joel (13 *N. Y.*, 488), felt bound to yield to the authority of Phillips *a.* Gorham (17 *N. Y.*, 270). He then states, emphatically, that doubts as to the power of the Legislature to make such change, or their intention to do so in the Code, must be set at rest. The constitution had already required the testimony in both kinds of cases to be taken in the same mode. (Art. VI., Sec. 10.) The Code (§ 69) expressly abolishes the distinction between actions at law and suits in equity, and all existing forms of action therein, and makes all actions substantially the prosecution of proceedings to obtain

a remedy or a protection by judgment (§ 2; People *a.* County Judge of Rensselaer, 13 *How. Pr.*, 400). After abolishing all previous forms of pleading, it restricts such forms, as well as the rules for determining the sufficiency of pleadings, to those which it prescribes (§ 140). It requires the complaint to contain only a statement of facts constituting a cause of action, in addition to the title of the cause, and a demand for relief (§ 142). It permits but a certain number of objections to the complaint, none of which are that the action is equitable, when it should have been legal, or *vice versa* (§ 144). On the trial, no objection can be taken to the complaint, except to the want of jurisdiction of the court, or the insufficiency of the facts stated in it to constitute a cause of action generally (§147), and not that it has stated such a cause of action as was legal, when it ought to have been equitable, or *vice versa*, or that the plaintiff has confined himself to either kind of relief. After answer, any relief may be given consistent with the case made by the complaint (§ 275). Trials by jury are given in all actions for the recovery of money, or specific real or personal property, notwithstanding they might formerly have been equity cases (§ 253). Summons, by which actions are commenced, are divided into two classes: one where only the recovery of money on a contract is sought, and the other embracing all other kinds of relief (§ 129), although courts of law formerly afforded specific relief, as in cases of replevin, ejectment, nuisance, and the like; and courts of equity decreed the payment of money due on contracts,—among others, in suits for specific performance by vendors. The object of such division was simply to enable the plaintiff to obtain judgment for the amount claimed, if not opposed, without the necessity of any action by the court (*Code*, § 246, subd. 1), and perhaps to obtain the benefit of a trial by jury (§ 253). Although I apprehend the court may refuse to allow that mode of trial, if it can see from the face of the complaint that the plaintiff, although entitled to some relief, is not entitled to recover a sum of money.

In Wood *a.* Wood (26 *Barb.*, 360), where specific relief was awarded, although a judgment for money was demanded; and in Cole *a.* Reynolds (18 *N. Y.*, 74), where an accounting was ordered, and judgment given for the balance to be found due, although the action was brought for the balance due on

an account stated, the utter ignoring by the Code of all distinctions between legal and equitable causes of action is well and forcibly put. Besides, a demand for legal and equitable relief in the alternative has been sustained (Young *a.* Edwards, 11 *How. Pr.*, 202), and relief in the alternative given (Stevenson *a.* Buxton, 8 *Abbotts' Pr.*, 414). A judgment for damages has been given when a contract could not be specifically performed (Pitt *a.* Davison, 12 *Abbotts' Pr.*, 385), or the plaintiff has failed in proving a case for it, although he attempted it. (Greason *a.* Keteltas, 17 *N. Y.*, 491.) Equitable relief asked for has been denied, and legal relief given (See *a.* Partridge, 2 *Duer*, 463); and both may be given to take effect in succession. (Marquat *a.* Marquat, *ubi sup.*; Bidwell *a.* Astor Mutual Ins. Co., 16 *N. Y.*, 263.) These cases illustrate the extent of the disregard by the Code of the legal or equitable nature of the cause of action.

The plaintiffs in this case were, therefore, not excluded from all relief by any distinction maintained in the Code corresponding to that formerly kept up between causes of action available only in a court of law and those cognizable in a court of equity, and by having so impressed on their case the features of those of the former kind as to deprive them of relief in case it turned out to be one of the latter. This, however, does not relieve us from the necessity of determining whether some part of that distinction may not still be retained or a new one created by the Code, depriving them of relief in the mode in which they have sought it, although manifesting a case entitling them generally to relief.

The form of the summons prescribed in the Code makes a distinction between cases for the recovery of money only and those where other relief is sought (*Code*, § 129); and in the former the plaintiff may take judgment in case the complaint is unanswered, for the amount mentioned in it (§ 246), thus requiring the complaint to state the amount claimed. In all actions for the recovery of money, a jury trial is a matter of right (§ 253), and amendments to pleadings are limited to those consistent with the case in the complaint (§ 275.) Possibly these provisions may deprive the plaintiffs, where they have given notice in their summons that the relief sought by them is the recovery and payment of money, and demanded such relief in

their complaint, of the right of so amending their pleadings as to change their case, so far as to the relief sought, as to deprive the defendant of the right of trial by jury. If so, it will be necessary to examine how far such inviolable right of trial by jury has deprived the plaintiffs of a right to equitable relief by decreeing the payment of the purchase-money to them when they have only established a conditional right to the purchase-money on making a good title and conveying it to the defendants. The only difference between the judgment of a court of law for the purchase-money of land, and the decree of a court of equity for the same, always was, that the latter permitted and required the vendor to make a good title before he was entitled to such money. In the former case, the vendee, upon paying the purchase-money on the judgment, was left to his remedy of filing a bill for specific performance. (Richards *a.* Edick, 17 *Barb.*, 260; 4 *T. R.*, 781; 5 *Ib.*, 366.) I find it, therefore, impossible to conceive how the clogging of the plaintiff's demand for relief, with any of the conditions imposed by a court of equity, can make the action at all the less one for the recovery of money and one requiring a jury trial. Such conditions are for the vendee's benefit, and should be claimed by him. There is nothing which calls for the plaintiffs' offering to do such acts; they are imposed by the court as conditions of granting relief.

There is no room to infer that the Code must intend by some provision to prevent a vendor of land, when plaintiff, from recovering the purchase-money of it in case of a sale, if his contract is oral and partly performed, in case he simply demands the money due him, without offering to perform all the conditions usually exacted in a court of equity, merely because, in an action for money, it requires a jury trial. It would not follow that the plaintiff must keep both the money recovered and the land, because no condition is imposed on him in the same action in favor of the defendant. There is nothing to prevent the latter from commencing an action for the recovery of the land as soon as he has paid its purchase-money, whether voluntarily or by coercion of a judgment. (Richards *a.* Edick, 17 *Barb.*, 260; 4 *T. R.*, 781; 5 *Ib.*, 386). It would not be very harsh to put actions at law where the contract was in writing, and suits in equity where it was not, on the same footing. And

that would be the case if courts could do nothing else, upon a verdict assessing the plaintiff's damages at the amount of the purchase-money, than award an unconditional judgment for it. But I apprehend the Code will be found to have made ample provision for such a case, and to have enabled the court still to give equitable relief, notwithstanding a trial by, and verdict of, a jury upon the issues of fact in a cause. It would be absurd to suppose they could not in an action for divorce, the issues in which are expressly required to be tried by a jury (§ 253.) It is hardly less so in actions for specific real or personal property, when deeds or other instruments are to be executed, which actions are also required to be so tried. (*Ib.*) It remains to be seen whether, when money is sought to be recovered, the court cannot impose equitable conditions. The argument in favor of such consequence appears to be based solely on two provisions of the Code; one requiring a jury to assess the amount of the recovery (§ 263), and the other requiring the clerk to enter judgment in conformity with the verdict (§ 264). The latter is, perhaps, not a very lucid expression; but it evidently means such judgment as the verdict warrants, thus assimilating the proceedings on a trial by jury with those by the court, in which latter case the findings of fact and conclusions of law are required to be separately stated. (*Code*, §§ 267, 268, subd. 2.) There are cases in which the judgment is provided by the statute, which do not require the exertion of much judicial knowledge. Thus, in case of a set-off, the defendant is entitled to judgment for the excess of his claim beyond the plaintiff's (§ 263); and in an action for the delivery of personal property, the judgment is also prescribed (§ 277). But even in case of a trial by a jury, affirmative relief is expressly required to be given to the defendant, if the verdict is in his favor (§ 263); and the plaintiff is entitled to whatever is consistent with his case, if the verdict be in his favor (§ 275). A verdict is nothing but a finding of facts in favor of one or other of the parties upon all or some of the issues. Those issues are created by the pleadings. (*Code*, §§ 248, 250.) A trial is their judicial examination (§ 252), even when they are tried by a jury (§ 253), and is kept, throughout, entirely distinct from the judgment.

The jury is bound to pronounce upon every issue of fact in the cause in favor of one or other of the parties. (*Code*, § 260.)

The judgment, when entered in a book called the judgment-book, is required to specify clearly the relief granted, or other determination of the action (§ 280.)

The judgment in conformity with the verdict to be entered by the clerk in his minutes, under the 264th section of the Code, is therefore only such as is either fixed by statute or is merely for the amount assessed by the jury. The very heading of the eighth title of the Code separates the judgment from the trial. The sixth chapter of that title is devoted to the mode of entering judgment after a trial. It requires judgment, except when the clerk is so authorized to enter it, or upon confession, or when given at general term, to be entered upon the direction of a single judge, or a referee's report (§ 278). Such judgment is to be entered in a judgment-book, and to specify clearly the *relief granted*, or other determination of the action (§ 280). The court is authorized, by section 264, itself to stop the clerk's entry of judgment by reserving *a cause for further consideration*. There is no difference between the effect of a trial by the court and one by a jury, except in the different tribunal which is to pass upon the facts. The decision of the court on which judgment is to be entered (§ 267) consists of *findings* of fact equivalent to the verdict of a jury, as well as conclusions of law. The similar *findings* of a jury, as distinguished from a verdict, may control a general verdict (§ 262), which then becomes mere matter of form. The relief to which the plaintiff is declared by such sixth chapter (§ 275) to be entitled, is to be governed not by either the verdict or the findings of the court, or the summons or prayer for relief in the complaint, but by the case made by the complaint and embraced in the issue. Any difficulty in the way of the same modification by the court in its judgment, of the relief asked by the complaint, or sought by the action, in the shape of pecuniary payments, which a court of equity would formerly have made, is, notwithstanding the necessity of a trial by jury and a verdict for the plaintiff, assessing his damages at a sum of money, purely imaginary. If the court is powerless to hold back the judgment which must be entered by the clerk on a general verdict for a sum of money, it can at least procure that control by directing specific findings upon particular questions (§ 261), by which they can overrule such general verdict and such

inevitable consequences of an absolute judgment (§ 262); thus performing the same office as it would have done had it tried the questions of fact itself. Without any action by the jury on the question of fact, they are called upon to assess the damages on the trial (§ 263); but the court is to pronounce the judgment. Upon a set-off, the jury may give a verdict upon both parties' claims, yet judgment is only to be given for the excess. Whatever may be the jury's verdict upon the facts, the defendant is to have his affirmative relief, if entitled to any. (*Ib.*) So that general verdicts cannot in all cases control the judgments.

The idea that the only relief to be given to a defendant after a trial and verdict, is by a new trial, is inconsistent with the provision in section 264 of the Code, that a cause, after a verdict, besides being reserved for argument, may be also reserved for further consideration. That means something more than passing upon a motion for a new trial. The cause has been considered so far as to dispose of the issues of fact in it by the verdict of a jury; it requires more consideration to adjudge what shall be the relief. But the equitable conditions imposed by the court on the right of enforcing payment of a sum of money are not affirmative relief granted to the defendant; they but modify that given to the plaintiffs. If they had originally inserted those modifications in their demand for relief in the complaint, they would not the less have made their action one for the recovery of money, and that only.

But if the only difficulty in the way of giving the plaintiffs in this case the right to the purchase-money of their term of years, be the right of trial by jury, the defendant has put it out of the way by waiving a trial by jury. When parties consent that a cause may be tried without a jury, the fact that they were originally entitled to one cannot change the course of proceeding prescribed for the court by the Code. They can only try it, and dispose of it in the manner therein prescribed. (§§ 266, 267, 268.) The judgment is to be entered according to its decision, and that decision is required to contain both findings of fact and conclusions of law. If the court, in this case, had found the making of such an agreement as was alleged in the complaint, and that the plaintiffs were able, at the time of the trial, to give a good title to the term of years sold,

but that such agreement was only oral, although partly performed so as to take it out of the Statute of Frauds; and further, either that time was not of the essence of the contract, or that the contract was to be performed within a reasonable time, and a tender of conveyance had been made within that time, what conclusion of law could have been added except that the plaintiff was entitled to his purchase-money on making a proper conveyance? Would it have been prevented by finding, further, that the plaintiffs did not insert in their prayer for relief that condition? Such a result would at least defeat the ends which the Code declares it was passed to accomplish, if it would not be a mockery of justice.

If, therefore, the contract, although not in writing, was sufficiently partly performed to take the case out of the Statute of Frauds, and time was not of its essence, I think the plaintiffs were entitled to recover the purchase-money, or at least so much of it as they claimed. The evidence is sufficient to establish such a contract, to be performed either within a reasonable time or before the succeeding spring after it was executed, and a part performance by payment of money, occupation of the premises, and removal by the plaintiffs of their stock; and the plaintiffs were entitled to recover the part of the purchase-money they claimed.

But assuming that this is to be considered only an action at law, there is room for inquiry, whether on the facts as found, the plaintiffs are not entitled to recover. The agreement of purchase is found by the court to have been in writing, and that both parties had a reasonable time in which to perform it. It is further found, that the premises at the time of sale were subject to certain encumbrances, and a prior owner had made a general assignment of his property to an assignee, who never went into possession of the premises; that the defendant had at a certain time notified the plaintiffs of the existence of such encumbrances and outstanding interest, and after waiting a reasonable time for their removal, had rescinded the contract by a notification of a refusal to take the title. And also that on a certain day the plaintiffs had tendered a conveyance without removing all the encumbrances, which it appeared by the evidence, was only refused in consequence of such supposed rescission. It was not found, that the time of such tender was

not a reasonable time from the time of making the contract, in which to perform it, either as matter of law, or matter of fact. But it was held as a conclusion of law, that the defendants had a right to rescind the contract, after waiting a reasonable time from the notification of the existence of the liens and outstanding claims, for their removal; and, of course, that it was the plaintiffs' duty to remove such liens and cloud on the title within such reasonable time. It does not appear, whether the learned judge, before whom the cause was tried, considered that the unreasonableness of the time which elapsed after notice of the encumbrances, without removing them, affected the question of the reasonableness of the time for the performance of the contract, which had elapsed since it was made. If the reasonableness of the time elapsing after notification of encumbrances, for their removal, be the only ingredient to determine the reasonableness of the time for performing the contract after it was made, and is identical therewith, then, under the views of the court, the plaintiffs were not entitled to recover. But if other considerations are to affect such question of reasonable time to perform the contract, clearly, if it had such legal effect imputed to it by the court, the defendant could not modify the contract by a notification to remove encumbrances, or terminate it by notice, after giving a reasonable time for such removal.

Reasonableness of time is a question of fact (Patteshall *a.* Trauter, 4 *Nev. & M.*, 649; Fielder *a.* Starkin, 1 *H. Bl.*, 17; Bain *a.* Case, 3 *Car. & P.*, 497), determinable by circumstances (Wibert *a.* The N. Y. & Erie R. R. Co., 2 *Kern.*, 249), and has been said to be, in regard to some contracts, the time it would take a person of ordinary business talents to perform the act required. (Smedberg *a.* More, 26 *Wend.*, 242.) This could not be the rule in regard to the conveyance of premises used as livery-stable, filled with horses and vehicles. Besides, there was evidence of an agreement by the defendant to allow the plaintiffs to keep possession until the 1st of January, 1861, and again until the 1st of March following. No notice was given of encumbrances until the latter part of February, and even then there was no peremptory demand for their removal. The defendant had possession, or occupied the premises until March, as one witness testified, being after the notice to remove en-

cumbrances. His counsel consulted with the other party as to the mode of relieving the premises from the effect of the assignment.

Moreover, one of the objections made was the outstanding interest of the assignee (Allen), which was required to be got rid of, when in fact he had no interest. This court has recently decided, at general term, that a general assignment does not pass a leasehold interest, without some act of assent or acquiescence, by taking possession, collecting rent, and the like; and I see no distinction in this case from the fact of the assignor executing such assignment to obtain a discharge from his debts. It is true, the statute declares that such assignment shall vest in the assignees all the interest of the insolvent, at the time of executing the same, in any property, whether such interest be legal or equitable (2 *Rev. Stat.*, 21, § 28 [§ 33, 5th ed.]); but that provision was merely to carry equitable interest, which might not otherwise pass, and not in order to burden the assignee with responsibilities not intended by him to be assumed. Indeed, such assignment, if rightly executed and framed, ought to enumerate the property ordered to be assigned and set forth in the inventory of the insolvent, or subsequently disclosed. (2 *Rev. Stat.*, 17, § 5 [§ 8, 5th ed.]; *Ib.* 20, § 25 [§ 30]; *Ib.* 21, § 29 [§ 34, 5th ed.]). In requiring the getting in or release of such outstanding interest, the defendant asked for more than he was entitled to, and his notification, therefore, was unavailing, and the reasonableness of the time for the performance of the contract should have been determined without regard to such notification.

I cannot, therefore, avoid the conclusion, under the findings of the court, that the defendant had no right to terminate or rescind the contract when he attempted it, unless the reasonable time for performing it had expired; that there was evidence to show that it had not; and that even taking an unreasonable time to remove encumbrances after knowledge of them, could not modify the original contract, or give the defendant a right to rescind it; and that even if it did, the inclusion of an interest, which he was not bound to remove, renders such requisition harmless. The question, how far the apparent title in Allen made the title unmarketable, cannot be agitated in an action at law—the only question there being, if the title was good at the time of the tender?

Unless the assessments, therefore, prevented the plaintiffs from making a good title, they would have been entitled to recover; but the refusal to take the title was not put on that ground, but of the rescission if it had been, *non constat;* but that the plaintiffs would have removed them. And in any event being pecuniary, they could be deducted from the purchase-money.

I am of opinion, therefore, that the plaintiffs are entitled to a new trial, with costs to abide the event, and the judgment should be reversed for the purpose.

Judgment affirmed.

GREENLEAF *a.* MUMFORD.

Supreme Court, First District; Special Term, October, 1865.

ATTACHMENT.—FRAUDULENT ASSIGNMENT.

The drawing of checks without funds to meet them is, when unexplained, a badge of fraud, and coupled with the simultaneous transfer of a large sum to a friend, in a clandestine manner, is conclusive, and leaves the sum so transferred liable to the attachments of creditors.

By an attachment issued as a provisional remedy under the Code of Procedure, the plaintiff in the action obtains such a lien upon the property attached as will entitle him to the intervention of equity to remove or set aside fraudulent obstacles to the enforcement of the lien; and for this purpose he may maintain an action to reach a fund fraudulently transferred by the debtor.

Although such an attachment must be signed by the judge granting it, it is not essential that the copy served should have a copy of the judge's signature subscribed to it.*

The notice accompanying the attachment, to be served on a third person, may describe the property attached in general terms, without specifying its precise nature and amount.

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* A similar principle applies in the case of the deponent's signature of an affidavit. (Barker *a.* Cook, 16 *Ante*, 84; Graham *a.* McCoun, 5 *How. Pr.*, 358.) So, too, the omission of the attorney's signature from the original order may be supplied by amendment. (Kissam *a.* Marshall, 10 *Ante*, 424.)

It is not necessary that the sheriff's inventory of attached property should be made on the same day or immediately after the attachment is served.

Where property fraudulently conveyed to a third party for the benefit of the defendant is by him deposited with a bailee, it is not necessary to give notice of attachment to the former before levying on the property in the bailee's hands.

Trial by the court.

The complaint in this case set out the sale and delivery, on the 12th August, 1865, by the plaintiffs, of twenty thousand dollars in gold to the defendant, Peter R. Mumford, for $28,200, payable on the delivery of the gold; the receipt of the check for that amount, its presentment, and the refusal of the bank to pay it for want of funds; that Mumford was guilty of a fraud in the purchase of the gold, knowing well that he had no funds in the Mechanics' Bank to meet his check; that Mumford had sent to the defendant, John Oakey, certified checks on the Tradesmen's Bank to the amount of about $53,000, with the request that Oakey would hold the same for his, Mumford's, benefit; that Oakey drew the checks from the Tradesmen's Bank and deposited the amount to his own credit in the Nassau National Bank, another of the defendants in this action, drew his checks therefor, and had the same certified by the Nassau National Bank, but had not parted with the checks, and that the money was still in the bank, and the checks with Oakey; that the plaintiffs commenced an action against Mumford on the 19th of August, 1865, for the recovery of the check of $28,200, and on the same day issued an attachment, and had it levied on the property of Mumford in the Nassau National Bank, the $53,000 nominally to the credit of Oakey being really held for the use of Mumford; the recovery of judgment in that action; and that it was Mumford's intention that the certified check should be delivered by Oakey to him, or used for his benefit.

That the defendant, Albert Speyer, claimed this money by virtue of an assignment made by Mumford to him, August 19, 1865; but that the attachment above mentioned was levied by the sheriff on the money before the execution and delivery of the assignment; that the deposit of the money and drawing of checks as above stated was a contrivance of Mumford's and Oakey's to secure the money from the creditors of Mumford, and

to prevent or defeat the levy of an attachment or execution thereon.

That it was pretended by Mumford, Oakey, and the Nassau National Bank, that the money belongs to Oakey, and is not subject to the claims of Mumford's creditors.

The plaintiffs then demanded judgment, that the said money be decided to be Mumford's money at the time of issuing and levying the said attachment, and for other relief.

The different defendants answered in various ways, all, however, substantially denying that the property was levied upon under the attachment.

Under motions and orders of the court, the sum in dispute was paid into court by Oakey, except $3,000, which Oakey claimed to reserve in payment of a debt due to himself.

On the trial, a motion was made to dismiss the complaint as not showing facts sufficient to constitute a cause of action, which was denied. Proof was then given of the judgment in the other case, and that the attachment was duly issued and was served on the Nassau National Bank, between 12 and 1 o'clock on Saturday, the 19th of August, and on Oakey at a few minutes past 3 P.M. John Oakey in his testimony admitted that he received the money for Mumford, it being intended to hold the same so as to make an arrangement with the creditors. It was also shown that the assignment to Speyer was delivered on the 19th of August, about 2.45 P.M., a short time before the attachment was served on Oakey, though after the attachment was served on the bank. This assignment was for the benefit of creditors.

Jenkins, *Opdyke*, and *Ackerman*, for the plaintiffs.

F. F. Marbury, opposed.—I. This is a contest between the defendant Speyers, who, as assignee, claims the fund for the benefit of all the creditors of Mumford, without partiality or preference; and the plaintiffs, who, under their attachment, and the judgment which Mumford offered to allow them to take against him, seek to appropriate to themselves nearly two-thirds of the fund (about $30,000), to the detriment and exclusion of the other creditors who are equally deserving, being the vic-

tims of Mumford's misconduct, just in the same way that the plaintiffs were.

Courts of equity will never violate or infringe this principle, that "equality is equity," if it be possible to maintain it. (Murray *a.* Riggs, 15 *Johns.*, 583; Norton *a.* Coons, 6 *N. Y.*, 40; Bower *a.* Harbeck, 9 *Ib.*, 593; Murphy *a.* Harvey, 4 *Edw.*, 132; Sconten *a.* Bender, 3 *How. Pr.*, 189; Bank of Rochester *a.* Emerson, 10 *Paige*, 359.)

The reason why courts of equity look with such jealousy and disfavor on preferential assignments for the benefit of creditors, is that they violate this rule of equality. What would otherwise have been regarded as small vices in instruments of this character, have been seized on as fatal defects for this reason; because the court always, upon principle, sets its face against unequal distributions of the estate of an insolvent debtor, as repugnant to the general sentiments of a court of conscience and equity.

The court will, therefore, uphold the assignment against the attachment, unless prevented from so doing by some clear and invincible impediment. It will not overlook or amend defects.

II. The plaintiffs, if they succeed, must do so on the strength of their own title. Their claim is *strictissimi juris*. They must bring themselves clearly, distinctly, and perfectly within the statute, in order to have a *locus standi* in court at all. They cannot carry off from the other creditors of Mumford this large sum of $30,000 without exhibiting a clear and incontestable right to it.

1. The statute is a new remedy, and operating as it does to transfer property from the debtor to the sheriff, should be construed strictly. (Orser *a.* Grossman, 11 *How. Pr.*, 520; 4 *E. D. Smith*, 443.)

2. Before the statute the plaintiffs would have been obliged, in order to reach this fund, to have obtained a judgment, to have issued an execution and had it returned unsatisfied, and to have filed their bill, to reach the equitable assets and things in action of the defendant, for the appointment of a receiver to take the fund. All the requirements and appointments of the law must be strictly, carefully, and literally performed, or the owner cannot be divested of his estate. (Tallman *a.* White, 2 *Comst.*, 70; Dike *a.* Lewis, 2 *Barb.*, 344; Waller *a.* Harris,

20 *Wend.*, 355; People *a.* Covell, 18 *Ib.*, 598; People *a.* Sheriff of Broome Co., 19 *Ib.*, 89; Silliman *a.* Wing, 7 *Hill*, 159.)

III. The statute defines and prescribes very clearly in what way a service on property incapable of manual delivery must be made in order to make it effectual. (See *Code*, § 227.) The plaintiff must show—1. A right to the attachment (§ 235); 2. That having the right, they obtained it in an attachment signed by a judge; 3. The service of a copy of it; 4. In addition thereto, a notice showing the property levied on; 5. This copy of the warrant of attachment and notice showing the property levied on must be served on the individual holding the property.

All and each of these things must have been done, or the plaintiff acquired no lien. For the statute being a new remedy must be construed strictly. (Orser *a.* Grossman, 11 *How. Pr.*, 520; 4 *E. D. Smith*, 443; Skinner *a.* Stuart, 15 *Abbotts' Pr.*, 391; S. C., 39 *Barb.*, 207.) Without all these, the plaintiffs have no place in court. They break down on their own want of title.

IV. If plaintiffs had the right to attach, and the attachment, then these fatal objections to their title remain:

1. No copy of the warrant of attachment was served. The original, to have possessed any value, must have borne the signature of a judge authorized to grant it. The paper without this is nothing but a stationer's blank, with some filling in by a lawyer's clerk. The paper actually served on the Nassau National Bank had no signature of any judge upon it, nor any copy of any signature. It was not a copy of any attachment that could be of any force. The attachment of which it was a copy, if any such original existed, was of no force or effect. BARNARD, J., in Cantrell *a.* Ferris, discharged an order of arrest because the copy served did not have the judge's signature, and was therefore no copy, and refused to allow affidavits to be read, whereon the notary's signature had been omitted from the copies served.

2. There was no notice showing the property levied on; and this is a fatal defect. (Wilson *a.* Duncan, 11 *Abbotts' Pr.*, 3; Orser *a.* Grossman, 11 *How. Pr.*, 520; 4 *E. D. Smith*, 443; Kuhlman *a.* Orser, 5 *Duer*, 242; Wood *a.* Orser, 25 *N. Y.*, 353.)

3. The Nassau National Bank was not the individual holding

the fund or property. There was no money in the bank to Mumford's credit, and never was,—nothing to which the attachment by its own terms could apply. The fund was in Oakey's name until he drew his checks and got them certified. When he did so, his balance was extinguished,—the certified checks being charged to him,—and it was as if he had drawn the bills. He held the obligations of the bank, and he was the person to be reached. The fund was to be reached through him, and the checks which he held, and only so. Until those checks were indorsed and presented no one could get a dollar from the bank. The money in the end was obtained through the checks. In no other way could it have been reached.

4. The service on Oakey was not only too late, but if was nugatory for want of a notice showing the property levied on. (See cases *supra* on same point.)

The assignment was delivered at 2.45 P. M., August 19, 1865; the service on Oakey was at 4 minutes past 3.

V. As to the suggestion that the copy of the attachment may be amended under section 173, I have only to say that there is no motion to amend. (See § 173.) When such a motion is made, the court will impose such terms in allowing the amendment (if allowed at all) as may be proper. One of those terms would be undoubtedly that it should be without prejudice to the rights of the assignee: it would not do to allow the amendment, in order to give one creditor a preference over others equally meritorious. (Bank of Rochester *a.* Emerson, 10 *Paige*, 359.) But there can be no amendment except upon motion. This is the case of amending pleadings on a trial. It is to be disposed of on the facts existing when the action was commenced.

CLERKE, J.—1. Since the decision in Rinchey *a.* Stryker (28 *N. Y.*, 45; S. C., 26 *How. Pr.*, 75), I consider it no longer an open question whether, when an attachment is issued under the Code of Procedure, the plaintiff in the action obtains such a lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims or transfers, or any other fraudulent obstacles in the way of the realization of the lien, in case the plaintiff

should recover a judgment.* Undoubtedly, previous to that decision, a great diversity of opinion existed among the members of the bench and the bar relative to this right; many being of opinion that no such right existed until the plaintiff proceeded to judgment and execution, and thus exhausted his common-law remedies. Nothing, however, appears in Skinner *a.* Stuart (15 *Abbott's Pr.*, 391), sustaining this latter view. That was an action avowedly brought in pursuance of the provisions of the Code of Procedure, relative to the specific remedies afforded by those provisions for the realization of the property of the defendant in the possession of third parties, or for the recovery of money due to him. The plaintiff had not complied with the requirements of those provisions; and, even if he had, there was nothing in the case which authorized the interposition of the equitable or extraordinary jurisdiction of the court. It exhibited no fraud, collusion, or combination, obstructing the ordinary legal process.

2. This action, then, having been properly brought, and the court having the right to afford the remedy prayed for, if the facts entitle the plaintiff to it, was the transfer of the $53,000 to Oakey by Mumford, fraudulent and void? and if it was, has the plaintiff obtained a specific lien upon it to the amount of his claim, to the exclusion of the assignee of Mumford, and his other creditors? And first, as to the transfer of the $53,000 by Mumford to Oakey, I think the fraudulent intent cannot for a moment be doubted? On the 12th day of August, 1865, he bought of A. L. Leyton & Co., Greenleaf, the plaintiff in this action, and many others, various sums of American gold coin; in the whole amounting to about $110,000 in gold, and in currency to about $150,000. For this gold he gave his checks to the several sellers on the Mechanics' Bank. These checks were all dishonored. Undoubtedly, it was very possible, by unexpected failure, or dishonesty on the part of the persons with whom he dealt on the day in question, that he may have been rendered incapable of making good his account on that day; and the single circumstance that he had no funds in the bank at the time when the checks were presented was not of itself

* See also Hall *a.* Stryker, 27 *N. Y.*, 596, reversing S. C., 29 *Barb.*, 105; 9 *Abbotts' Pr.*, 342.

conclusive evidence of fraud. Therefore, no criminal prosecution could be maintained against him founded on this single circumstance. The necessities of business require that the drawing of checks in cases of this nature, when there are no funds in the banks in the early portion of business hours, should be tolerated if the bank is in the habit of certifying checks for the drawer. But in the case before us no explanations are given, and no excuse appears why Mumford did not make his account at the bank good. On the contrary, we find him about this time disposing of a large amount of money in a clandestine manner; and, instead of depositing it in the Mechanics' Bank, placing it elsewhere, and transferring $53,000 of it to his lawyer and friend, the defendant Oakey. Taking all these circumstances together, purchasing gold to this large amount (in currency) of $150,000 from various dealers, giving his checks to the several sellers, which were all dishonored, and then making a clandestine and surreptitious disposition of a large amount of money immediately thereafter, can leave no room for any doubt that the whole amount of this surreptitious transfer is to be deemed liable to any attachments which his creditors may have issued against it, or any portion of it; and that, as in other cases, the maxim of the law applies, *Vigilantibus, non dormientibus jura subveniunt*—the laws assist those who are vigilant, not those who sleep over their rights. As for example, the creditor who first levies an attachment, or an execution, has a preference over other creditors out of the property on which the levy is made.

3. Has the attachment been executed in this case in such a manner as to give the plaintiff in the action before us the preference which the law gives to the most vigilant?

It is objected by the counsel for the assignee that no copy of the warrant of attachment was served, because a copy of the judge's signature was not subscribed to it. The signature of the judge who grants the warrant is no doubt indispensable to its validity. Without it there would be no assurance to the officer who executes it that it is genuine. But I cannot conceive that the same reason exists for adding the signature to the copy. It is proper that the person who is in possession of property of the defendant, or who is indebted to him, should know the contents of the body of the warrant, and that it was

issued, in order that he may be able to conform to what is required of him. The sheriff needs more than this; for, on seeing that the warrant has not the signature of the judge subscribed to it, he would at once discover that he had no authority to execute it; and if he attempted to do so, he would be a *tort feasor.*

The next objection relative to the execution of the warrant is, that the notice accompanying the warrant was defective. This notice informs the person on whom it is served that "all the property of the defendant in the attachment, and his effects, rights and shares of stocks, with interest thereon, and dividends therefrom, and the debts and credits of the said defendant, now in possession of the said person, or under his control, will be liable to the attachment, and the said person is required to deliver all such property into the custody of the sheriff without delay, with a certificate thereof." I have examined all the authorities referred to by the defendant's counsel. In Orser *a.* Grossman (4 *E. D. Smith*, 443; S. C., 11 *How. Pr.*, 520), there is no positive decision on the subject. The language of the court (the Court of Common Pleas) is: "It is questionable whether a general notice that the sheriff attaches all the property in the hands of the debtor of the defendant in the attachment is a sufficient attachment under the Code;" and they decide the case on another point. In Kuhlman *a.* Orser (5 *Duer*, 242); and Wilson *a.* Duncan (11 *Abbotts' Pr.*, 3), the Superior Court undoubtedly did decide that a general notice was not sufficient: in other words, that the precise property, its nature and amount, must be specified in the notice. I am not aware of any decision upon this subject, rendered by this court, in any district of this State.

I confess, in the absence of such a decision, I am not inclined to follow those in the Superior Court, to which I have above referred. To require so precise a specification in all cases would be impracticable, and would deprive many a creditor of the remedy which this process affords. Many plaintiffs are ignorant of the precise amount, and even nature, of the property belonging to their debtors in the hands of third parties, although they may have abundant reason to believe that there is some property in their hands at the time of issuing and serving the attachment. They may obtain the information, or compel it in

the manner provided by section 236; but this is after the attachment has been issued, and notice of it served; and in the mean time, if the reasoning in the cases referred to is correct, there is nothing to prevent the person on whom the notice is served from delivering the property to the defendant, or to prevent a debtor of the defendant from paying him the debt due. I do not think the Legislature intended to deprive creditors of the benefit of this provisional remedy, merely because they are ignorant of the precise nature and amount of a fraudulent or non-resident debtor's property in the hands of third parties, within the jurisdiction of the court. No serious inconvenience can occur by the absence of this specification in the notice. The copy of the warrant, which the notice accompanies, always states the exact amount claimed; and I cannot see, therefore, what embarrassment the holder of the property can be subjected to by the generality of the notice. He knows what the property is, and its amount; and by examining the warrant he can easily ascertain the amount of the claim. The plaintiff in the action requires only that amount with costs, and nothing more; or if the holder surrenders the whole to the sheriff, and it exceeds the amount of the claim, he is exonerated from all further liability. The property is in the safe custody of the law.

In the case before us, the Nassau Bank could certainly have suffered no wrong or inconvenience from the want of this specification. The officers of the bank knew the exact amount deposited with them; and they knew equally well, from the warrant, the precise amount of the claim. In Kuhlman *a.* Orser, to which I have been referred, the court say that the sheriff is required by section 232 to make an inventory of the property; and if he has sufficient information to enable him to make an inventory, he has sufficient to enable him to give notice specifying the property. On the contrary, the provisions of the Code presume no such thing. He is not obliged to make an inventory forthwith. After serving notice of the attachment, he can require a certificate from the individual or corporation in possession of the defendant's property; and if they refuse to furnish it, they can be required to do so by the order of the judge; and obedience to such order may be enforced by attachment. In my opinion, the Legislature did not intend that the

sheriff should make this inventory on the day, or immediately after the day, upon which he serves the attachment; nor did it require of him that he should have sufficient information at the time of the service to enable him to give a notice containing an exact specification of the property, for the reason that it provides a method by which he could procure this information after the attachment has been issued, and notice of it has been given to the holder of the defendant's property.

I consider, therefore, that the notice served in this case was sufficient.

As to the objection that the notice was defective in being served only on the Nassau Bank before the execution and delivery of the assignment, the law requires that the notice should be left with the debtor, corporation, or individual holding such property. In this case, the Nassau Bank held the property. The sum of $53,000 was actually deposited in its vaults at the time; and I have shown that this money, at the said time, belonged to the defendant Mumford, because the transfer which he endeavored to make of it was fraudulent, and therefore void.

Judgment for the plaintiff, in conformity with the prayer of the complaint.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this Volume:

Viz., 28, 29 and 32 New York (1, 2 and 5 Tiffany); 10 Bosworth; 19 Abbotts' Pr.; 20 Howard's Pr.; 5 Parker's Cr.; and in the Laws of 1865.*

ABATEMENT.

1. Actions for the recovery of real property not to abate by the death of any party defendant, or of the plaintiff, but may be continued against or by the successor to the possession of the defendant, or the rights of the plaintiff: such substitution to be made on motion within one year; or, in case of a defendant, it may be afterwards on supplemental complaint. *Laws of* 1865, 634, ch. 357, § 1.
2. This does not alter or affect the provisions of the Code of Procedure as to the time of commencing actions; but a party thus substituted may set up those provisions in defence, as if the action had been originally commenced against him at the date of such substitution. *Ib.*, § 2.
3. In any action affected by the provisions hereof, no judgment for damages, or for mesne profits, shall be given or rendered against such substituted defendant, for a longer time than that in which he has been in the actual possession of the premises sought to be recovered. *Ib.*, § 3.
4. When the holder of a mechanic's lien has in good faith commenced proceedings to enforce it, an order ought always to be granted to continue such lien, so that the lienor may not be prejudiced by the lapse of the year before the litigation can be terminated. *N. Y. Com. Pl.*, 1865, Welch *a.* Mayor, etc., of New York, *Ante*, 132.
5. Such order may be made *ex parte*, or upon notice. *Ib.*
6. The death of one of several appellants, pending their appeal from an order cancelling a satisfaction of a judgment against them, does not

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* Except the amendments to the Code, which were inserted in our previous volume, in advance of the publication of the laws.

render it necessary to substitute the legal representatives of the deceased in order to prosecute the appeal. *Ct. of Appeals*, 1863, McGregor *a.* Comstock, 28 *N. Y.*, 237.

7. The filing of a supplemental complaint for the purpose of reviving an action after the expiration of a year from the death of a party, is a matter of right. *Supreme Ct.*, 1864, Roach *a.* Lafarge, 19 *Abbott's Pr.*, 67.
8. A motion for leave to file such a supplemental complaint is unnecessary, and should be denied, leaving the applicant to file it as he may be advised. *Ib.*

COURT OF APPEALS; PARTIES, 17; SUPPLEMENTAL COMPLAINT.

ACCOUNTING.

1. Where an action for an accounting between partners is referred to a referee, with power to require defendant to produce an account, and the defendant, when required by the referee to produce such account, offers proof that the partnership books have been taken from his possession by the plaintiff, and that he is unable to render such an account, it is the duty of the referee to receive such proof; and an absolute direction to render the account, without inquiry into such fact, is improper. *N. Y. Superior Ct.*, 1863, McCartan *a.* Van Syckel, 10 *Bosw.*, 694.
2. Under such circumstances, an attachment ought not to be granted to punish the defendant for not complying with the order. *Ib.*

ACKNOWLEDGMENT OF DEEDS.

An act in relation to the acknowledgment or proof of the execution of instruments in writing by persons in foreign countries. *Laws of* 1865, 776, ch. 421.

ACTION.

1. Action lies by owner of land for wanton injuries, or defacement, or affixing advertisements, etc. *Laws of* 1865, 859, ch. 222.
2. A private action does not lie against a city corporation for the injury which the plaintiffs have sustained by insufficient drainage. The duty of the corporation is one of a judicial or discretionary nature. *Ct. of Appeals*, 1865, Mills *a.* City of Brooklyn, 32 *N. Y.*, 489.
3. Town commissioners of highways are not liable to a private action for a mere neglect or omission to keep the highways of their towns in repair. *Ct. of Appeals*, 1864, Garlinghouse *a.* Jacobs, 29 *N. Y.*, 297

4. Distinction between actions for waste, and for trespass; and in what cases treble damages are recoverable under the statute. Van Deusen *a.* Young, 29 *N. Y.*, 9.

5. An action will not lie in the Supreme Court to obtain leave to issue an execution upon a judgment in the County Court: the relief sought must be afforded by the County Court where the judgment is. *Supreme Ct., Sp. T.*, 1864, Niles *a.* Perry, 29 *How. Pr.*, 192. But compare *Laws of* 1864, 1194, ch. 543, cited 18 *Ante*, 505.

ATTACHMENT, 2; CAUSE OF ACTION.

ADMEASUREMENT OF DOWER.

In proceedings for the admeasurement of dower, the surrogate's decree extends no further than to fix the extent and location of the lands assigned in the report. The title is not affected, and still remains open to dispute. [2 R. S., 403, § 17.] *Ct. of Appeals*, 1865, Wood *a.* Seely, 32 *N. Y.*, 105.

ADVERSE POSSESSION.

A conveyance of land, by an official assignee in bankruptcy, pursuant to an order of court, is not within the prohibition of the statute against conveying lands held adversely. [6 Wend., 224; 2 Barb., 159; 1 Seld., 320.] *N. Y. Superior Ct.*, 1862, Stephens *a.* Palmer, 10 *Bosw.*, 60.

AFFIDAVIT.

An affidavit by a petitioning creditor, that a sum of money, "being the sum annexed to his name subscribed to the petition, is justly due to him from the said insolvent for goods, wares, and merchandise sold and delivered, secured by indorsement of M.'s note,"—*Held*, sufficient to support an insolvent's discharge. *Supreme Ct.*, 1865, Pratt *a.* Chase, *Ante*, 150.

DISTRICT COURT, 1.

AMENDMENT.

1. In an action on a policy of insurance, issued on account of whom it may concern, when the interests of the owners are erroneously stated in the complaint, the court, in its discretion, may permit an amendment of the pleadings on the trial, in conformity with the facts proved.

Such an amendment does not change the character of the action. *Ct. of Appeals*, 1865, Walsh *a.* Washington Ins. Co., 32 *N. Y.*, 427.

2. Upon an appeal from the judgment of a justice of the peace in summary proceedings to recover possession of land, if the appellant in good faith gives due notice of appeal, an omission through mistake to do any other act necessary to perfect the appeal or to stay proceedings,—*e.g.*, the giving of security,—is amendable by leave of the court. *Supreme Ct.*, 1865, Briggs *a.* Swales, *Ante*, 323.
3. The irregularity of an appearance and answer of an infant defendant by attorney, and of a trial and verdict upon the issue thus formed, is not one which can be cured by amendment, by granting plaintiff's motion for the appointment of a guardian *nunc pro tunc*, the proceedings to stand as if in his name. Such an irregularity is an error of fact, for which a judgment would be reversed or set aside if entered. [14 Johns., 417; 2 Code, 28.] It was never curable by the statute of jeofails, and cannot be obviated in this way against the defendant's objections, although he is now of full age. He may, if he chooses, waive the irregularity; but the court cannot compel him to abide by his answer and the trial under it, if he elects not to be bound. *Supreme Ct., Sp. T.*, 1865, Boylen *a.* McAvoy, 29 *How. Pr.*, 278. But compare Rutter *a.* Puckhofer, 9 *Bosw.*, 638; Havens *a.* Sherman, 42 *Barb.*, 636.

INSOLVENCY, 2, 3.

ANSWER.

1. An answer in terms merely denying "each and every *material* allegation in the complaint," is evasive, and obnoxious to a motion that it be made more definite and certain. *N. Y. Superior Ct.*, 1863, Mattison *a.* Smith, *Ante*, 288.
2. A denial in an answer should, by its words, so describe the allegations of the complaint which the pleader intends to controvert, that any person of intelligence can identify them. *Ib.*
3. In an action by the indorsees of a promissory note, suing as a corporation, against the maker, an answer which admits the making and dishonor of the note, and notice of non-payment given to the indorsers, and merely denies the corporate character of the plaintiff, the partnership of the indorsers, and the plaintiffs' title to the note, may be struck out as sham, on affidavits containing testimony on those points, which would be sufficient to establish the facts upon a trial; especially where the defendant, in support of his answer, does not deny the allegations of such affidavits, but merely denies that he has any knowledge or information sufficient to form a belief as to their truth. *N. Y. Superior*

Ct., 1863, President, &c., of the Agawam Bank *a.* Edgerton, 10 *Bosw.*, 669.

4. An answer setting up that the note sued on was made for the accommodation of the payee, and upon the understanding that the indorsee had delivered certain property to the payee, and that, as defendant is informed and believes, it never was delivered, and the consideration of the note totally failed, is not sufficient to show a case of misappropriation, which will prevent the answer from being stricken out as sham, on proof by affidavit that such note was discounted by the plaintiffs in good faith, and without notice that it was an accommodation note. *Ib.*

5. In an action to recover moneys alleged to be due to the plaintiff from the defendant, a defence alleging that a third person had given defendant notice that he was owner of such moneys, and of any cause of action therefor, and demanded payment to himself, by virtue of an assignment from the plaintiff, is irrelevant. *N. Y. Superior Ct.*, 1863, Carpenter *a.* Bell, *Ante*, 258.

6. A defence setting forth supplementary proceedings taken against the plaintiff by a judgment creditor, in which the plaintiff and the defendant had been forbidden to transfer, dispose of, or interfere with the property of the plaintiff, is not irrelevant. *Ib.*

7. A defence set up in an original answer, is not to be struck out as irrelevant, merely because the matter of it arose after suit brought. *N. Y. Superior Ct.*, 1863, Carpenter *a.* Bell, *Ante*, 258.

8. Mitigating circumstances set up in an answer in an action for libel are not a defence within the meaning of section 160 of the Code, which requires a pleading to be made definite and certain. Where the precise nature of the defence is not apparent, such allegations are to be regarded as a mere notice. *N. Y. Superior Ct.*, 1864, Maretzek *a.* Cauldwell, 18 *Abbotts' Pr.*, 35.

9. In actions for defamation, the defendant may set up a justification, or he may allege facts short of a full justification, but giving some color to the charge by way of modification, or he may do both. And in either case he may prove the facts as they are, though they fall short of a justification; and the jury may take them into consideration for the purpose of mitigating the damages. *Ct. of Appeals*, 1864, Wachter *a.* Quenzer, 29 *N. Y.*, 547.

10. In an action for defamation, in saying that the plaintiff borrowed money and ran away, an answer alleging the truth of the charge in the same general terms, is insufficient to admit evidence. The fact that the plaintiff might have moved to make the answer more definite and certain, and did not do so, does not render such answer available. *Ib.*

11. Although the Code does not expressly require the defendant, in his answer, to state the relief he demands, he must set forth whether he interposes a mere defence or a counter-claim. *N. Y. Superior Ct.*, 1862, Clough *a.* Murray, 19 *Abbotts' Pr.*, 97.

12. An answer, setting up as a defence a failure of consideration, must state whether it is a partial or total failure. *Ib.*

13. In an action for damages for an unlawful entry on plaintiff's premises, &c., an answer setting up title in the defendant, and that the plaintiff had, by issuing an injunction, deprived the defendant of possession,—*Held*, under the circumstances, sufficient to make out a counter-claim. Ashley *a.* Marshall, 29 *N. Y.*, 494; affirming S. C., 9 *Ante*, 361.

14. The provisions of the Code regulating the taking of objections to a complaint may be considered as impliedly equally applicable to an answer setting up a counter-claim; and when an issue of fact is raised upon it, the plaintiff must be deemed to have waived every objection to form, not raised by reply or demurrer thereto. *N. Y. Superior Ct.*, 1863, Ayers *a.* O'Farrell, 10 *Bosw.*, 143.

15. After the parties have litigated the case upon the merits, it is too late for the plaintiffs to object to the sufficiency of the answer. [1 Kern., 237; 3 Ib., 127; 18 N. Y., 585; 20 Ib., 355; 15 How. Pr., 399.] *Ct. of Appeals*, 1863, Crans *a.* Hunter, 28 *N. Y.*, 389.

16. Under an answer merely averring that the note sued on was void for want of consideration, and that the plaintiffs are not *bona-fide* holders, the defence of usury, though it appear by the evidence on the trial, is not available to the defendant. *Supreme Ct.*, 1865, Mechanics' Bank of Williamsburgh *a.* Foster, *Ante*, 47.

17. In an action against the corporation of the city of New York to recover for work and labor, an answer setting up that there was an appropriation made by law for such work, which has been exhausted, is insufficient, unless it appears clearly from the pleadings and the law referred to, that the work was covered by the appropriation, and not by others contained in the same law. *Supreme Ct.*, 1864, Donovan *a.* Mayor, &c., of N. Y., *Ante*, 58.

18. If it does not appear by the pleadings whether the contract was made by any of the city departments or not, an averment that no appropriation had been made as required by section 28 of the charter of 1857, is insufficient. *Ib.*

COUNTER-CLAIM; DEFENCES; PLEADING.

APPEAL.

1. An appeal does not lie to the Court of Appeals from an order under the act of 1862, granting a reference of an action concerning an unpaid demand made by the receiver of a mutual insurance company. *Ct. of Appeals*, 1865, Sands *a.* Harvey, *Ante*, 248.

2. Appeals lie to the Court of Appeals from determinations of the Supreme Court in certain proceedings under the act of 1864 (ch. 142), relative to the Northern Railroad Company and its successor. *Laws of* 1865, 903, ch. 511.

3. An order of court made in a foreclosure suit, after judgment and sale, setting aside the sale and ordering a reference with a view to ascertain the equities of the parties,—*Held*, not appealable to the Court of Appeals. It neither, in effect, determines the action in which it was made, nor presents a judgment from which an appeal might be taken. It is substantially an order directing a resale of mortgaged premises on the ground of mistake and surprise. The granting of such an order, when it involves no question of strict legal right, is within the discretionary powers of the court below. Nor is it a final order. Hence it is not appealable. *Ct. of Appeals*, 1863, Downs *a.* Congdon, 28 *N. Y.*, 122.

4. The right to make an extra allowance, in addition to costs, being a matter of discretion on the part of the judge who makes the order, the Court of Appeals has no power to review the exercise of that discretion or to examine as to the merits or amount of the allowance. *Ct. of Appeals*, 1864, People *a.* N. Y. C. R. R. Co., 29 *N. Y.*, 418.

5. Where an order granting an extra allowance of costs was made after judgment, pursuant to a stipulation, by which all rights were reserved; —*Held*, that the Court of Appeals would, on an appeal from the order, exercise the same jurisdiction which would have belonged to them if the order had been parcel of the judgment. *Ib.*

6. An appeal lies to the Supreme Court from an order of the County Court, dismissing an appeal from a judgment of a justice of the peace, in summary proceedings to recover possession of lands. Such decision of the County Court is not final, for it neither reverses nor affirms. [16 N. Y., 367; Code, § 344; 24 Barb., 438.] *Supreme Ct.*, 1865, Hammond *a.* Carpenter, 29 *How. Pr.*, 43.

7. An appeal lies to the Supreme Court at general term, from an order of the city judge of Brooklyn, denying a motion for a new trial made upon the judge's minutes, without reference to whether any appeal has been taken from the judgment. *Supreme Ct.*, 1865, Ganson *a.* Mitchell, *Ante*, 163, *note.*

8. An order for an extra allowance made by a single judge before judgment, is the subject of an appeal to the court at general term. It may, perhaps, be doubted whether a question respecting the costs can be said to involve the merits of the action; but it affects a substantial right, within the meaning of section 349 of the Code of Procedure. The term "substantial right" is used in distinction from formal right. Suitors have a certain right to require the observance of all the terms of legal procedure; but, inasmuch as it would be productive of infinite delay and expense if every decision upon a matter of practice was subject to be examined on appeal, the Legislature wisely determined that the litigation upon such points, which were generally of minor importance, should be limited to the court or judge who first made the order. But an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a matter of form, but in substance. *Ct. of Appeals*, 1864, People *a.* N. Y. Central R. R. Co., 29 *N. Y.*, 418.
9. On appeal from an order granting an allowance in addition to costs, the court will not review the discretion of the judge in respect to the amount granted. *N. Y. Superior Ct.*, 1863, Mora *a.* Great Western Ins. Co., 10 *Bosw.*, 622.
10. An order made by a judge after the commencement of the trial of a cause before him without a jury, and before his final decision thereof, that the cause stand over, and that further evidence may be offered upon points designated, is not reviewable upon an appeal taken from the order before the final decision of the cause, and before any evidence has been received under the order. *N. Y. Superior Ct.*, 1862, Phelps *a.* Ward, 10 *Bosw.*, 617.
11. The proper mode of reviewing such order is, to except to evidence offered under it, and to appeal from the judgment, or to move to set aside the decision, as in the case of a trial by jury. *Ib.*
12. An order refusing to appoint a receiver in supplementary proceedings is appealable. *N. Y. Superior Ct.*, 1862, Heroy *a.* Gibson, 10 *Bosw.*, 591.
13. An order appointing an appraiser to ascertain the value of property attached, for the purpose of discharging the attachment upon the giving of an undertaking, is not appealable. It does not involve the merits or affect substantial right, but rests wholly in the discretion of the judge to whom the application is made. *N. Y. Superior Ct.*, 1863, Lupton *a.* Jewett, *Ante*, 320.
14. An order referring issues of fact, on allegations that they involve the examination of a long account, is appealable to the general term, and

may be reversed, if the account is not a long one within the rule. *Supreme Ct.*, 1865, Dickinson *a.* Mitchell, *Ante*, 286.

15. The amount of security to be given on an appeal, by the defendant, from an order granting a new trial, is regulated by the Code of Procedure; and the court will not make an order staying proceedings on any other terms. *Supreme Ct., Sp. T.*, 1865, Dyckman *a.* Valiente, *Ante*, 130.

16. The provision of the Code of Procedure (§ 256), that in the first judicial district there need be but one notice of trial from either party, does not apply to notice of argument on an appeal to the general term. *Supreme Ct.*, 1865, Walsh *a.* Gregory, *Ante*, 363.

17. When the parties to an action have settled the judgment, and the plaintiff has acknowledged satisfaction, the court will not hear an appeal which had been previously taken, merely because the plaintiff's attorney desires judgment on the appeal for the protection of his right to costs. If the settlement of the judgment is a fraud on his rights, his remedy is by motion. *N. Y. Superior Ct.*, 1863, Cock *a.* Palmer, *Ante*, 372.

18. Where a motion for a new trial is granted unless the plaintiff stipulate to reduce the verdict, in which event the motion is denied, the plaintiff, by giving the stipulation and entering judgment thereon, waives his right to appeal from the judgment. *N. Y. Superior Ct.*, 1863, Clarke *a.* Meigs, 10 *Bosw.*, 337.

19. Where an order is granted upon condition of payment of costs, accepting the costs under the order is a waiver of any right to appeal from it. *N. Y. Superior Ct.*, 1863, Lupton *a.* Jewett, *Ante*, 320.

20. Actions in which executors and administrators are sole plaintiffs or sole defendants, and in which the appeal prevents the issuing of letters testamentary or of general administration, shall have a preference in the Court of Appeals, and in the Supreme Court, at the general term thereof, over all actions, except in criminal cases, and in cases in which the people are a party, and may be moved out of their order on the calendar upon notice of intent so to do. *Laws of* 1860, ch. 167, as amended by the *Laws of* 1865, 355, ch. 218, § 1.

21. The only effect of the act of 1865 (Laws of 1865, ch. 218, § 1), which gives a preference to appeals (in the Court of Appeals and Supreme Court) to certain actions in which executors, &c., are parties, is to allow cases in which the people are a party to have a preference, *if moved*, over those where executors and administrators are sole plaintiffs or defendants, and over those in which the appeal prevents the issuing of letters testamentary and of general administration. *Ct. of Appeals*, 1865, Preferences on the Calendar, 32 *N. Y.*, 604.

22. The party who alleges error in the court below, holds the onus of

showing that from the facts found, an erroneous legal conclusion has been deduced; or that some error of law has occurred in the interlocutory proceedings by which such conclusion was reached. *Ct. of Appeals*, 1865, Mead *a.* Bunn, 32 *N. Y.*, 275.

23. Under the power given to the Court of Appeals to reverse, affirm, or modify the judgment appealed from in whole or in part [Code, § 12], where a judgment appealed from in mandamus is erroneous because for damages, the court may reverse it as to damages, and direct the proper judgment, viz., that a mandamus issue, &c. Where this was done,—*held*, that it ought to be without costs to either party. *Ct. of Appeals*, 1863, People *a.* Supervisors of Richmond, 28 *N. Y.*, 112.

24. The court will not allow an appellant to raise, upon the appeal, for the first time, an objection to an assumption by the court below of a doubtful fact, where he took no objection below to such assumption, but only to conclusions of law based thereon. [8 N. Y., 67; 12 N. Y., 486.] It is not just for a party to lie by, and, after turning the whole attention of the court and his adversary to questions of law covering the whole case, suddenly to spring a mine upon him, upon appeal, by taking advantage of an oversight in proving a minor fact. [12 N. Y., 442; 19 Barb., 664; 20 Ib., 429.] *N. Y. Superior Ct.*, 1862, Pollen *a.* Leroy, 10 *Bosw.*, 38; *Ct. of Appeals*, 1864, Oatman *a.* Taylor, 29 *N. Y.*, 649.

25. Upon appeal, the court will not presume that the jury have been misled by a particular portion of the judge's charge, when the necessary qualifications have been made in other parts thereof. *Ct. of Appeals*, 1865, Vosburgh *a.* Teator, 32 *N. Y.*, 561.

26. Where no objection was made to the defendant's answer, on account of its setting up a counter-claim arising since the commencement of the action, nor to the defendant's proof offered in support of it, that it related to matters arising after suit brought; nor was the point raised by exception to the report of the referee:—*Held*, that the plaintiff was not in a situation to avail himself of the objection on appeal. *Ct. of Appeals*, 1864, Ashley *a.* Marshall, 29 *N. Y.*, 494; affirming S. C., 9 *Ante*, 361.

28. If any thing is inserted in the judgment entered on the decision of the court on a trial without a jury, which is not contained in the decision, the judgment is not merely irregular, but is substantially erroneous, and will be reversed on appeal. *N. Y. Superior Ct.*, 1865, Loeschigk *a.* Addison, *Ante*, 169. But compare Smith *a.* Coe, 29 *N. Y.*, 666.

29. Whenever on a disputed fact there is a conflict of testimony, the preponderance must be overwhelming to induce the court to disturb

the finding, either of a jury, or a justice who tries the case without the intervention of a jury. *Supreme Ct.*, 1864, Commissioners of Excise of Onondaga Co. *a.* Backus, 29 *How. Pr.*, 33.

30. Where the question is, whether an assignment for the benefit of creditors is fraudulent in fact, the finding of the referee, upon conflicting evidence, that it is not fraudulent, cannot be disturbed by the Supreme Court. Notwithstanding the Supreme Court may reverse on a question of fact, such reversal must be consistent with the rules of law. *Ct. of Appeals*, 1864, Ball *a.* Loomis, 29 *N. Y.*, 412.

31. Finding of a jury upon conflicting evidence as to genuineness of handwriting, conclusive. Magee *a.* Osborn, 28 *N. Y.*, 669.

32. A County Court, on appeal from a justice of the peace, has authority, under section 336 of the Code of Procedure, to modify the judgment, according to the justice of the case, without regard to technical errors. The general term of the Supreme Court has the same power, on appeal from a decision made at a special term. [23 How. Pr., 463; 15 Abbotts' Pr., 6.] The Court of Appeals has the same power. [1 Seld., 405; 21 N. Y., 179.] *Ct. of Appeals*, 1865, Brownell *a.* Winnie, 29 N. Y., 400.

33. Where an order made at special term is correct on the facts there presented, the court will not interfere with it on appeal upon an agreed statement, presenting essentially different facts. *N. Y. Superior Ct.*, 1863, Crawford *a.* Kelly, 10 *Bosw.*, 697.

34. Where the plaintiff sued to have a mortgage cancelled which he alleged was paid, and the referee found that a certain sum was due, and the defendant excepted to certain of his rulings, and the referee dismissed the complaint,—*Held*, that the general term, upon an appeal by the plaintiff from the judgment, could review the case on the exceptions taken on the trial, and also upon the facts, so far as to determine whether the findings were warranted by the evidence; and that the Court of Appeals could review the case so far as questions of law were raised upon the trial, by the exceptions, although the defendant could not and did not appeal to the general term. *Ct. of Appeals*, 1864, Beach *a.* Cooke, 28 *N. Y.*, 508.

35. That on a finding of fact of a conveyance to the plaintiff by a warranty deed, he may be presumed a *bona-fide* purchaser. Beach *a.* Cooke, 28 *N. Y.*, 508.

ABATEMENT, 6; AMENDMENT, 2; CASE; COURT OF APPEALS; EXCEPTIONS; NEW TRIAL.

APPEARANCE.

The unauthorized appearance of an attorney of the Supreme Court, for a defendant not served with process, will not confer jurisdiction on the Marine Court, so as to prevent the defendant from going into the merits of the original controversy in a subsequent action on the judgment rendered in the Marine Court. *N. Y. Com. Pl.*, 1865, Porter *a.* Bronson, *Ante*, 286.

ARBITRATION.

1. A verbal agreement of the parties to a submission, that the award shall not be in writing, and that they will abide by a verbal award, has the effect to change the submission from one under seal to a mere verbal one. *Ct. of Appeals*, 1863, French *a.* New, 28 *N. Y.*, 147; reversing S. C., 20 *Barb.*, 481.
2. The provisions of 2 Rev. Stat., entitled "Of arbitrations," regulating the mode of proceeding in arbitrations, apply not only where the written submission contains an agreement that judgment may be entered; but to all written submissions generally. Under a submission to three arbitrators, with a provision that the award should be in writing, signed by the three, "or any two of them," and ready for delivery by a certain day fixed, two of the arbitrators cannot lawfully meet and hear the proofs and allegations of the parties, when the third had notice, and refused to take part in the proceedings; and an award made by the two, who heard the matters submitted, under such circumstances, is not a valid and binding award. *Ct. of Appeals*, 1864, Bulson *a.* Lohnes, 29 *N. Y.*, 291.
3. A married woman is competent to submit to arbitration a claim made by her to an account for the proceeds of real estate sold, which was her separate estate, held by her under the acts of 1848 and 1849. The ancient strict rule of the common law, touching awards made under submissions by infants and married women, has been modified; and the rule more recently established is, that where a party has knowingly and voluntarily entered into a submission with a married woman or infant, and an award has been made against him, the court will not set it aside on the ground that the married woman or infant is not bound by it, as the party knew beforehand that they could not be bound by it, and therefore has all the consideration for his agreeing to his submission for which he stipulated; and if he did not mean to be satisfied with such effect as the award would have upon them, he ought not to have consented to the reference. [Russell on Arb., 22,

290, 637; 2 Dowl. & R., 148; 3 M. & W., 199; 6 Dowl., 483.] Moreover, the common-law disability, preventing married women from entering into contracts of submission, has been removed by the acts of 1860 (ch. 90), and 1862 (ch. 173). *Ct. of Appeals*, 1863, Palmer *a.* Davis, 28 *N. Y.*, 242.

AWARD.

ARREST.

1. The fact that a third person had interposed some claim to moneys which the defendant had received in a fiduciary capacity for the plaintiff, wherefore he refused to pay it over lest he should be liable, does not affect the plaintiff's right to have the defendant arrested in an action to recover such money. *N. Y. Superior Ct., Sp. T.*, 1864, Gross *a.* Graves, *Ante*, 95.
2. A deceit practised by one of several joint debtors, in inducing the creditor to accept his check, post-dated and indorsed by the other, is not a ground for authorizing his arrest in an action on the check against both. *N. Y. Superior Ct., Sp. T.*, 1865, Woodruff *a.* Valentine, *Ante*, 93.
3. Where goods are delivered upon an agreement to return them or to pay for them, the transaction may be regarded as a bailment, and not a sale, and the bailee is liable to arrest for a conversion. *Supreme Ct.*, 1864, Person *a.* Civer, 29 *How. Pr.*, 432; reversing S. C., 28 *Ib.*, 139.
4. The acceptance of a part payment, and of the bailee's notes for the residue of the value, is not, the notes being unpaid, an accord and satisfaction which waives the creditor's right to arrest. *Ib.*
5. Where it appeared by the affidavits upon which an order of arrest was granted, that the defendant incurred the debt sued for, in purchasing property from the plaintiffs, by fraudulently representing that he was a man of wealth, and the owner of a plantation and mine, and that he gave his notes to the plaintiffs for the amount of the debt, and after they became due, and were unpaid, he falsely represented to the plaintiffs that he was partner in a firm, upon whom he had authority to draw for the debt; whereupon the plaintiffs received from him, in lieu of the notes, his drafts upon his alleged firm, which the firm refused to accept;—*Held*, that an order of arrest was properly granted, and that upon the affidavits, on which a motion to set it aside was made and opposed, an order refusing to set it aside should be affirmed. *N. Y. Superior Ct.*, 1863, Murphy *a.* Fernandez, 10 *Bosw.*, 665.

6. Receiving the drafts, under such circumstances, does not preclude the plaintiff from obtaining an order of arrest. *Ib.*
7. Under subdivision 4, of section 179, of the Code of Procedure (as amended in 1863), the defendant, in an action to recover damages for false and fraudulent representations respecting the pecuniary responsibility of third persons, is liable to arrest upon proof of the cause of action merely, without proof of his non-residence, or intent to depart. *N. Y. Superior Ct., Sp. T.*, 1865, Hazlett *a.* Gill, *Ante*, 353.
8. The common-law rule, that while a constable has power to arrest without warrant, on the charge of a third person, in cases of felony, he has no such power in cases of misdemeanor, after the misdemeanor has been committed [1 Russell on Crimes, 598, 600; 3 Wend., 384], must be applied in accordance with the definitions of felony and misdemeanor at common law, except where the statute clearly and specifically alters the grade of the offences. The rule was founded upon the difference in the enormity of the offences, and upon the conviction that greater expedition might be necessary to secure arrests in cases of felony than in cases of misdemeanor. The reason for allowing arrests without warrant will not apply to an offence reduced by statute from the grade of felony to that of misdemeanor; and the reason failing, the rule fails with it. *Supreme Ct.*, 1864, Carpenter *a.* Mills, 29 *How. Pr.*, 473.

ASSESSMENTS.

1. An assessment for the *estimated* expenses of a local improvement in the city of New York, made *before* the work is done, by assessors appointed by the corporation, under section 270 of the act of 1813, which contemplates an assessment of the *actual* expenses after the work is done, is not legal, and will be set aside on an application under the act of 1858. *Supreme Ct., Sp. T.*, 1865, Beekman's Petition, *Ante*, 244.
2. Where an assessment is illegally made, in not complying with the ordinance directing it, a subsequent confirmation of the assessment by the Common Council will not cure the defect. *Supreme Ct.*, 1865, Turfler's Case, *Ante*, 140.

NEW YORK.

ASSIGNMENT.

1. It is no objection in a suit by the assignee of a foreign executor, that the assignment was made to avoid the difficulty arising from the inca-

pacity of such executor to sue. *Ct. of Appeals*, 1865, Petersen *a.* The Chemical Bank, 32 *N. Y.*, 21.

2. Under the statute of 1860—which requires assignments for benefit of creditors to be acknowledged—where an assignment is duly executed on the part of a firm by one of the partners, in their name, an acknowledgment made by the partner thus signing it, only, is sufficient. *Supreme Ct.*, 1865, Baldwin *a.* Tynes, *Ante*, 32.
3. One member of a firm may, with the express consent and direction of the other members, execute a valid assignment of all the firm-property in trust for the benefit of creditors. *Ib.*

ATTACHMENT.

1. Under the Code of Procedure, a warrant of attachment can only be issued when an action is depending. The authority to grant it against a non-resident of the State is given only "in an action for the recovery of money against a defendant, who is not a resident of the State." [Code, § 227.] The mere issuing of a summons is not the commencement of an action for general purposes (§ 99).* *Ct. of Appeals*, 1864, Kerr *a.* Mount, 28 *N. Y.*, 659.
2. By an attachment issued as a provisional remedy under the Code of Procedure, the plaintiff in the action obtains such a lien upon the property attached as will entitle him to the intervention of equity to remove or set aside fraudulent obstacles to the enforcement of the lien; and for this purpose he may maintain an action to reach a fund fraudulently transferred by the debtor. *Supreme Ct., Sp. T.*, 1865, Greenleaf *a.* Mumford, *Ante*, 469.
3. Although such an attachment must be signed by the judge granting it, it is not essential that the copy served should have a copy of the judge's signature subscribed to it. *Ib.*
4. The notice accompanying the attachment, to be served on a third person, may describe the property attached in general terms, without specifying its precise nature and amount. *Ib.*
5. It is not necessary that the sheriff's inventory of attached property should be made on the same day or immediately after the attachment is served. *Ib.*
6. Where property fraudulently conveyed to a third party for the benefit of the defendant, is by him deposited with a bailee, it is not necessary to give notice of attachment to the former before levying on the property in the bailee's hands. *Ib.*

CONTEMPT.

* This overrules Cushman *a.* Fischer, 16 *Ante*, 246, *note*.

ATTORNEY AND CLIENT.

1. It is not an indictable offence for an attorney of this court to buy a promissory note, with the purpose or intent to prosecute the same in a justice's court. *Supreme Ct.*, 1862, Goodell *a.* People, 5 *Park. Cr.*, 206.
2. The statute relating to attorneys [2 Rev. Stat., 288] was intended to apply to the mischief of making costs in courts of record. There is another statute applying to justices' courts, which prohibits only justices and constables from such transactions. *Ib.*
3. An attorney or agent, who has received from his principal, as a mere messenger or carrier, money to be delivered to a third person, although it be paid in performance of an agreement previously made between the principal and such third person, cannot set up any illegality in such agreement, as a defence to an action brought by the latter to recover it as money paid to his use. *N. Y. Superior Ct.*, 1863, Merritt *a.* Millard, 10 *Bosw.*, 309.
4. The corporation of the city of New York may appear on the record in actions to which they are parties, by any attorney, and may employ any counsel they may choose. *N. Y. Superior Ct.*, 1863, Mayor, &c., of New York *a.* Hamilton Fire Ins. Co., 10 *Bosw.*, 537.
5. An attorney who has by fraud obtained a judgment and execution, has power to stipulate that another judgment shall have priority over it in order to prevent a motion by the other judgment creditors to set it, aside. *Ct. of Appeals*, 1863, Read *a.* French, 28 *N. Y.*, 285.
6. The attorney who obtains a judgment, has a lien upon it for the amount of his costs. [18 N. Y., 368.] If the judgment be solely for costs, the record is notice to all the parties to the action that he has a lien to the amount of the recovery [16 How. Pr., 173, 174], and a payment of the judgment to the party on the record, by the plaintiffs, in fraud of the rights of the attorney, is in their own wrong, and is equivalent to paying to the assignor a debt which has been assigned, after notice of the assignment. [6 T. R., 361; 4 Cow., 416; 1 Doug., 238; 15 Johns., 405.] *Ct. of Appeals*, 1863, McGregor *a.* Comstock, 28 *N. Y.*, 237.
7. The fact that the defendant's attorney was not retained by the nominal defendant in the suit, but by the real party in interest, cannot defeat the lien of the attorney upon the judgment. The acquiescence of the nominal defendant in the conduct of the suit by the attorney, for the benefit of the party in interest, would preclude him from insisting that

the lien did not exist, and the opposite party in the action has no right to question it. *Ib.*

8. It is competent for an attorney and client to agree that any costs to be recovered by the latter in the action shall belong to the former; and such an agreement being followed by recovery of a judgment for costs, and an assignment of it to the attorney by the client, constitutes him the owner of the judgment, and prevents its being set off against a debt of the client to the debtor in the judgment. *Ct. of Appeals*, 1863, Ely *a.* Cooke, 28 *N. Y.*, 365; affirming S. C., 9 *Abbotts' Pr.*, 366.

AWARD.

1. A verbal award will not be valid, unless a verbal submission of the matters on which the award is made would be binding upon the parties. *Ct. of Appeals*, 1863, French *a.* New, 28 *N. Y.*, 147; reversing S. C., 20 *Barb.*, 481.
2. The fact that one of the parties, by consenting to a verbal award, prevented the arbitrators from making a valid award, will not deprive him of the right to show the invalidity of the one they did make. *Ib.*

BAIL.

1. The sheriff has no cause of action against bail who have failed to justify, until he has sustained damage from his own liability as bail consequent on such failure. *Supreme Ct.*, 1865, Clapp *a.* Schutt, *Ante*, 121.
2. Bail who have been excepted to by a party to an action, and have failed to justify, are not liable to such party on the undertaking. *Ib.*
3. Special bail who have become fixed, cannot, in an action against them as such bail, show, either in bar of the action, or in mitigation of damages, that, before the recovery of judgment against their principal, he was, and at all times since has been, utterly insolvent, and had no property whatever that could, or was liable to be applied towards the payment of such judgment. *N. Y. Superior Ct.*, 1863, Levy *a.* Nicholas, *Ante*, 282.

BANKRUPTCY.

An order of the court, made in proceedings in bankruptcy under the act of Congress of 1841, authorizing the official assignee to convey assets,

is valid, though it do not fix the time and manner of the sale. *N. Y. Superior Ct.*, 1862, Stevens *a.* Palmer, 10 *Bosw.*, 60.

ADVERSE POSSESSION.

BILL OF PARTICULARS.

1. In an action of an equitable nature, where a judgment in favor of the plaintiff had been so far opened by the Court of Appeals as to allow the defendant, an administrator, to establish a cross-claim for services rendered by his intestate during a number of years, the court below ordered a reference to examine and report on such claim, and at the same time required the defendant to furnish a bill of particulars of the services, specifying their nature and character, and the respective amounts claimed, and, as far as practicable, the dates and amount of of each item of such service.

   Held, that this order was not intended to require such a bill as is demandable of right, in actions of a legal nature, but rather to limit the defendant's claim to the matters contemplated by the decision of the appellate court, or, if any further claim was to be made, to require as particular a statement of it as the defendant could furnish *N. Y. Superior Ct.*, 1862, Mason *a.* Ring, 10 *Bosw.*, 598.
2. Hence, although the services were not rendered under a general employment at an annual salary, such order is satisfied by a general statement of a claim for services as general agent and manager, in taking charge of the affairs and property of the plaintiff for a specified number of years, at a specified rate per annum, if the defendant makes oath that he cannot give items more minutely. *Ib.*
3. If the defendant would claim to recover moneys paid by the intestate for the expenses of agents other than himself, such payments should be stated separately from his claim for services. *Ib.*
4. In such a case, an order for a further bill of particulars should not require more than the original order; and in so far as it does, it should be modified on appeal. *Ib.*

BILLS, NOTES, AND CHECKS.

Where a note is made by one partner in the firm-name for his own use, the firm are liable upon it to a party subsequently discounting it, where usury is not established, unless knowledge that the proceeds were not to be used for the benefit of the firm is brought home to

him. *Supreme Ct.*, 1865, Mechanics' Bank of Williamsburgh *a.* Foster, *Ante*, 47.

BOND.

1. A bond conditioned for the payment of a specified sum, or so much thereof as shall remain unpaid on certain notes held by the obligees after the application of all moneys received thereon, or on collaterals held by them, is not void for uncertainty. *Supreme Ct.*, 1865, Troy City Bank *a.* Bowman, *Ante*, 18.
2. Where, by the condition of a bond, the interest is payable at specified times before the principal sum becomes due, such interest, on a demand of it, after it has accrued, becomes principal, and will bear interest, from the time of such demand, or, if a demand is not proved, from the commencement of suit. *N. Y. Superior Ct.*, 1865, Howard *a* Farley, *Ante*, 126.

BROOKLYN CITY COURT.

APPEAL, 7.

CASE.

The practice of including in a case questions withdrawn, answers excluded without objection, and testimony not necessary to raise the questions on the exceptions, or stated in too voluminous a form, reprehended by the court. Hoffman *a.* Ætna Fire Ins. Co., *Ante*, 325.

CAUSE OF ACTION.

1. When a cause of action has once accrued it can only be destroyed by satisfaction or release. *N. Y. Superior Ct.*, 1865, Christianson *a.* Sinfard, *Ante*, 221.
2. Thus, where the defendant owning land, and knowing what was his true boundary, put up a building which encroached upon the adjoining land of the plaintiff,—*Held*, that the mere passive acquiescence of the plaintiff did not affect the title. *Ib.*
3. Where an open policy of marine insurance is issued for the benefit of a person designated, or whom it may concern, and merchandise to which the terms of the policy are applicable, belonging to such person and defendant jointly, is entered upon the policy pursuant to an agreement between them to insure at their joint expense, the defendant is

liable to the insurers for the premium. *N. Y. Superior Ct.*, 1865, Sun Mutual Ins. Co. *a.* Davis, *Ante*, 214.

4. An innkeeper is not liable to his guest for the loss of money brought into the inn by the latter, beyond such amount as is necessary for his travelling expenses, unless a special contract is shown, or an actual delivery to the innkeeper or his servant, with notice of the amount deposited, is shown. *N. Y. Superior Ct.*, 1865, Wilkins *a.* Earle, *Ante*, 189.
5. The liability of the innkeeper for baggage is analogous to that of common carriers of passengers. *Ib.*
6. The owner of land with an unsafe building upon it may be held liable for injuries done by the falling of the building, to the property of an occupant of adjoining land, notwithstanding the former had leased the premises to another person, reserving rent, but covenanting to repair. *Supreme Ct.*, 1864, Benson *a.* Suarez, *Ante*, 61.
7. *It seems*, that he would be liable without any covenant to repair. *Ib.*
8. It makes no difference that the covenant to repair was qualified as being for the purposes of an hotel. *Ib.*

ACTION; ATTACHMENT, 2; CLOUD ON TITLE; COMPLAINT; CREDITOR'S ACTION; FORECLOSURE; INSURANCE; INTERPLEADER; PARTIES, 1.

CERTIFICATE.

Every register of deeds in this State shall have and keep an official seal for his office, and all certificates required by law to be made by him shall be under his hand and official seal. *Laws of* 1865, 262, ch. 148.

CERTIORARI.

The relator in a certiorari to review proceedings in a justice's court is concluded by the return of the justice. If the facts are not correctly stated, he should apply for a further return; he cannot correct it by affidavit or assignment of errors. *Supreme Ct.*, 1865, People *a* Powers, *Ante*, 99.

CHATTEL MORTGAGE.

It is not necessary, in order to enable a mortgagee of chattels, whose mortgage has been once duly filed, pursuant to the statute upon that subject [Laws of 1833, ch. 279, § 1], to maintain an action against third parties for taking the chattels out of the possession of the mortgagor within a year from the filing of such mortgage, and selling

them, that such mortgage should be refiled with the statement required by the statute at the end of such year. *N. Y. Superior Ct.*, 1863, Manning *a.* Monaghan,* 10 *Bosw.*, 231.

CITY JUDGE OF NEW YORK.

The city judge of the city of New York has jurisdiction of summary proceedings, to dispossess a tenant from premises in that city. *Supreme Ct.*, 1865, People *a.* Russell, *Ante*, 136.

CLOUD ON TITLE.

1. A claim of dower which is not valid, but the defence to which rests upon parol evidence alone,—evidence which exists only in the memory of living witnesses, who may be removed from life, in the natural course of events, before the demandant proceeds to assert her claim by an action,—constitutes an apparent cloud on title which may be removed by an action brought for the purpose. *Ct. of Appeals*, 1865, Wood *a.* Seely, 32 *N. Y.*, 105.
2. Of the jurisdiction of courts of equity to remove unlawful assessments as clouds upon title. Lewis *a.* City of Buffalo, 29 *How. Pr.*, 335.

COMMMISSIONERS OF CHARITIES AND CORRECTION.

COMMITMENT, 9.

COMMITMENT.

1. Under the statutes authorizing the binding over of disorderly persons to keep the peace, the magistrate has power to commit such a person until sureties are given. *Supreme Ct., At Chambers*, 1865, Ann Doyle's Case, *Ante*, 269.
2. When a justice of the peace, after an examination, has adjudicated that a person brought before him shall give sureties to keep the peace, and the prisoner has refused to do so, it is his duty to issue his warrant of commitment; and such warrant issued on the next day will be valid, though, in the mean time, the prisoner has been suffered to go at large by the consent of the justice. *Supreme Ct.*, 1864, Gano *a.* Hall, 5 *Park. Cr.*, 651.
3. The distinction between a commitment under the statutes relating to the city of New York, for disorderly conduct, and under the Revised

* Reversed on other points, 28 *N. Y.*, 585.

Statutes, for being a disorderly person, stated. *N. Y. Com. Pl., At Chambers*, 1865, Case of the Twelve Commitments, *Ante*, 394.

4. Upon a conviction for disorderly conduct, the making and filing of a record is not necessary. *Ib.*
5. The act of 1859, empowering the magistrate to impose a fine of not more than $10, or commit to the city prison for not more than ten days [Laws of 1859, 1129, ch. 491, § 5], does not take away the power to require security for good behavior for any period not exceeding twelve months, and to commit the offender for such period in default of compliance. *Ib.*
6. The provision of the act of 1860, declaring certain acts to be disorderly conduct [Laws of 1860, 1013, ch. 508, § 20], does not repeal or supersede that of the act of 1833, which provides that any conduct which, in the opinion of the magistrate, tends to a breach of the peace, may be punished as disorderly conduct. *Ib.*
7. It is not necessary that a commitment for disorderly conduct should set forth the particular act complained of. *Ib.*
8. If the magistrate acted erroneously, or upon insufficient evidence, the remedy is not by *habeas corpus*, but by certiorari. *Ib.*
9. An order of transfer of a prisoner from the city prison to the workhouse must be made by the Board of Public Charities and Correction; but if by its terms it purports to be their act, an authentication by the signature of one of the commissioners is sufficient, at least, upon *habeas corpus*. *Ib.*
10. A commitment for disorderly conduct until the party shall find security for his good behavior, without qualification as to time, is void. It should be limited to a specified period not exceeding twelve months. *Ib.*
11. It is not necessary, upon a conviction by the Court of Special Sessions in the city and county of New York, that a record should be filed. *Supreme Ct., At Chambers*, 1865, Williamson's Case, *Ante*, 413.
12. If it were—*It seems*, that the omission to file one would not be ground for discharging the prisoner upon *habeas corpus*. *Ib.*
13. The filing of a record of conviction is essential to the validity of a commitment by a police justice for vagrancy. *Recorder of N. Y.*, 1864, De la Montange's Case, *Ante*, 413, *note*.

COMPLAINT.

1. The Code has not changed the former rule of pleading, that a party who has wholly performed a special contract on his part may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement. [3

Seld., 476; 19 N. Y., 231; 18 Ib., 522.] *Ct. of Appeals*, 1863, Hosley *a.* Black, 28 *N. Y.*, 438.

2. Under section 162 of the Code of Procedure, a complaint against the maker of a promissory note is sufficient, where it sets forth a copy of the note, and alleges that a specified sum is due thereon from the defendant to the plaintiff, although the note is, by its terms, payable to a third person, and there is no allegation of an indorsement by him. *N. Y. Superior Ct.*, 1862, Continental Bank *a.* Bramhall, 10 *Bosw.*, 595.
3. Requisites of a complaint in an action by a factor to recover deficiencies of his advances. Blackmar *a.* Thomas, 28 *N. Y.*, 67.
4. In an action by a sheriff, upon an undertaking given to him by a defendant, arrested under an order of arrest in a civil action, it is not necessary to allege in the complaint, that he had not delivered the order of arrest and undertaking to the plaintiff's attorney in such former action, as required by section 192 of the Code of Procedure, in case such attorney demands it. *N. Y. Superior Ct.*, 1863, Willet *a.* Lassalle, *Ante*, 272.
5. Any exoneration of the sheriff from liability, by such delivery, and the omission of the plaintiff to except to the bail, and the consequent liability of such bail to the plaintiff in such action, must come from, and be set up by, the defendant, affirmatively, as matter of defence in his answer. *Ib.*
6. It is not necessary to allege in the complaint in such action, that any action has been brought against the sheriff. *Ib.*
7. It is not essential to aver in terms that the undertaking was delivered, nor does an averment that it was under seal vitiate. *Ib.*
8. In an action upon an administration bond, to recover upon the administrator's disobedience of an order of the surrogate, requiring the payment of a debt, the complaint did not state that any application was made, and simply averred that "the administratrix was duly cited," &c., to show cause on the 8th of March, &c., setting forth the purport of the citation; and that "on or about that day," "upon reading and filing proof of the due service of said citation upon said administratix personally," &c., and on due proof of the claim, &c., it was adjudged, &c., and the answer denied that the administratrix was duly cited, and that the surrogate duly or pursuant to the statute adjudged, &c., and there was no evidence, except the recitals in the decree, that proof of due service had been read and filed;—*Held*, that jurisdiction was not admitted nor shown. *N. Y. Superior Ct.*, 1863, Behrle *a.* Sherman, 10 *Bosw.*, 292.
9. To sustain such an action, it must also appear that the execution issued on the docketed certificate of the decree conformed, in substance, with the requirements of the statute. *Ib.*

10. Sufficiency of statement of cause of action for libel on the manager of an opera, in respect of his business. Fry *a.* Bennett, 28 *N. Y.*, 324.

11. A stockholder of a corporation, in order to maintain an action for damages against the directors, whom he alleges have fraudulently misapplied the property of the corporation, and thereby rendered his stock valueless, must show that he has sustained damages beyond the intrinsic depreciation of the value of the stock, by the removal of such assets. An allegation, in the complaint, that the stock had become valueless is not sufficient. *N. Y. Superior Ct.*, 1863, Gardiner *a.* Pollard, 10 *Bosw.*, 674.

12. In an action brought to foreclose a mortgage, given to secure a bond made by one of the mortgagors and his partner, to secure the payment of certain notes, which notes were held by the mortgagees as collateral security for an indebtedness past due, it is not necessary that the complaint should allege that the notes held as collateral security had become due. A failure to comply with the condition of the bond makes out a sufficient cause of action. *Supreme Ct.*, 1865, Troy City Bank *a.* Bowman, *Ante*, 18.

13. Where the plaintiff seeks to redeem from a mortgage, an express general offer to pay any balance which might be found due, is not necessary in the complaint. [Hoffm., 353.] Were such offer necessary, it might fairly be inferred from an offer to pay the amount due, by the application of the balance to other accounts. *Ct. of Appeals*, 1864, Beach *a.* Cooke, 28 *N. Y.*, 508.

14. Leave to sue, no part of the cause of action, and not necessary to be alleged in the complaint. Dean *a.* Eldridge, 29 *How. Pr.*, 218.

15. Where an action is brought to obtain legal relief only, that relief being the recovery of money only, and the plaintiff upon the trial fails to establish a right to recover any thing upon legal grounds, the court cannot grant any equitable relief; for such relief cannot be deemed to be consistent with the case made by the complaint. *N. Y. Superior Ct.*, 1863, Towle *a.* Jones, *Ante*, 449.

15. That alternate relief may be sought. *Ct. of Appeals*, 1865, Wood *a.* Seely, 32 *N. Y.*, 105.

16. The prayer for general relief is proper in a complaint under the Code, and is not to be struck out on motion. *Supreme Ct., Sp. T.*, 1865, Hemsen *a.* Decker, 29 *How. Pr.*, 385.

17. That in an equitable action, it is unnecessary to look into the prayer for judgment, to determine whether the complaint states facts enough to authorize the particular relief prayed for. *Supreme Ct., Sp. T.*, 1864, Stewart *a.* Hutchinson, 29 *How. Pr.*, 181.

18. In an action in which the summons is for relief, and the facts stated

in the complaint are a good cause of action for equitable or specific relief, the complaint should not be set aside on motion because it demands judgment for a specified sum, especially where the complaint contains the prayer for general relief. *Supreme Ct., Sp. T.*, 1865, Hemsen *a.* Decker, 29 *How. Pr.*, 385.

AMENDMENT, 1; DISMISSAL OF COMPLAINT; LIBEL.

COMPROMISE.

1. It is the policy of the law to allow parties to settle and adjust doubtful and disputed facts between themselves; and when such matter, which before was uncertain, has been established by agreement between the parties, upon good consideration passing between them, they are not permitted afterwards to deny it. [2 Caines, 197; 15 Johns., 197; Ib., 497; 5 Cow., 387; 12 Wend., 508; 10 Barb., 333.] This rule applied to a question of boundary. *Ct. of Appeals*, 1865, Vosburg *a.* Teator, 32 *N. Y.*, 561; and see Crane *a.* Hunter, 28 *N. Y.*, 389.
2. Where fraud has been committed by misrepresentation and false statements, and the aggrieved party, with knowledge of the facts constituting the fraud, makes a compromise of the matter without suit, or after suit brought to redress the wrong compromises such suit, the compromise is valid, although the party committing the fraud may reiterate such misrepresentations and false statements, and affirm and reaffirm his integrity in the matter, in order to effect the compromise, and the aggrieved party thereby be induced to make the compromise. *Ct. of Appeals*, 1863, Adams *a.* Sage, 28 *N. Y.*, 103.

CONFESSION OF JUDGMENT.

1. A judgment by confession is not absolutely void because there is a defective statement; but it is voidable only at the instance of a party in interest. *Ct. of Appeals*, 1863, Read *a.* French, 28 *N. Y.*, 285.
2. A confession was accompanied by the following statement of the nature of the indebtedness: "The defendant has, from time to time, borrowed of the plaintiff money, and there is now due to the plaintiff from the defendant the sum of fifteen hundred dollars for cash borrowed, for which the plaintiff holds the note of the defendant, bearing date the 12th day of November, 1850, and payable six months after date. The plaintiff has assumed for the defendant the payment of the sum of two thousand dollars, for which the defendant has given to the plaintiff two notes made by said defendant of one thousand dollars each, one payable in sixty days from the 12th of November aforesaid,

and the other in ninety days from said date." *Held*, sufficient under the Code. *Ct. of Appeals*, 1863, Ely *a.* Cooke, 28 *N. Y.*, 365.

3. A statement, alleging that the defendants "are indebted to the plaintiff in the sum of $3,300, which indebtedness arose on account of goods purchased in the year 1853; that the whole amount of the purchase was $3,500, and the amount remaining due is $3,300; that the goods consisted of cloths, trimmings, etc., and were purchased at Providence, R. I., where said plaintiff resides," is sufficient, in point of form, although it is not alleged, in terms, that the goods were purchased by the defendants from the plaintiff, the words used plainly importing that fact. *Ct. of Appeals*, 1863, Read *a.* French, 28 *N. Y.*, 285.

CONSTABLES.

All laws relating to the election of constables in the city of New York repealed. Marshals to be appointed by the mayor, by and with the consent of the board of supervisors. *Laws of* 1865, 738, ch. 400.

CONSTITUTIONAL LAW.

The fifth section of the act of Congress of 1863, so far as it authorizes a removal of certain causes after verdict, and a trial and determination of the facts and the law, in the same manner as if the same had been originally commenced in the Circuit Court of the United States, is in violation of the seventh amendment of the constitution of the United States, and is, for that reason, null and void. *Supreme Ct.*, 1864, Patrie *a.* Murray, 29 *How. Pr.*, 312. Compare People *a.* Murray, 5 *Park. Cr.*, 577.

CONTEMPT.

1. Under the provisions of the Revised Statutes, relating to proceedings as for contempts to enforce civil remedies [2 Rev. Stat., 534], an attachment to bring a person before the court to answer for alleged disobedience of an order of the court or a judge, requiring him to appear in person, cannot be granted without proof, by affidavit, both of the service of such order, and of the failure to appear. *N. Y. Superior Ct.*, 1862, Ward *a.* Arenson, 10 *Bosw.*, 580.
2. A copy of such affidavits must, according to such statutes, be served on the person charged, a reasonable time before the return of the attachment, to enable him to prepare his defence. *Ib.*
3. A party should not be adjudged guilty of a contempt by reason of not complying with an order of the court, where he is incapacitated to

comply by the act of the adverse party, though that act be lawful. (Per BOSWORTH, Ch. J.) *N. Y. Superior Ct.*, 1863, McCartan *a.* Van Syckel, 10 *Bosw.*, 694.

4. When an order requiring a receiver to pay the fees of a referee who had passed upon his accounts, by its terms appeared to have been made without notice to the receiver, and by a different justice from the one before whom the motion was first heard, and did not recite regular adjournments,—*Held*, that the court would not enforce compliance with it by process for contempt. *N. Y. Superior Ct., Sp. T.*, 1863, Perkins *a.* Taylor, *Ante*, 146.

ACCOUNTING 2.

CONTRACTS.

Where a contract for the sale of goods, after having been executed on the part of the seller, is cancelled by the parties, and a new contract as to the mode of payment is substituted in place of it, the seller cannot rescind the sale and reclaim the goods, by reason of a fraudulent intent, on the part of the buyers, not to pay therefor, existing only at the time of the original contract. And the mere failure to perform the new contract is not sufficient to show that the fraudulent intent continued in respect to the new contract. *N. Y. Superior Ct.*, 1863, Sparks *a.* Leavy, *Ante*, 363.

CONVICTION.

COMMITMENT.

COSTS.

1. Where several defendants, not united in interest, made separate defences by separate answers, and recovered against the plaintiffs separate judgments for damages in the nature of counter-claims, and the plaintiffs appealed from such judgments, and the judgments were affirmed on appeal, with costs to the respondents,—*Held*, that the respondents were each entitled to tax separate bills of costs. *Supreme Ct.*, 1865, N. Y. and N. H. R. R. Co. *a.* Schuyler, 29 *How. Pr.*, 89.
2. Where a cause is at issue on issues of fact, and is regularly noticed for trial and placed on the calendar, and when reached in its order, the complaint is dismissed on the failure of the plaintiff to appear, there has been a trial of the action, within the meaning of section 309

of the Code of Procedure, which authorizes the making of "a further allowance," after trial, in certain cases, in addition to costs. *N. Y. Superior Ct.*, 1863, Mora *a.* Great Western Ins. Co., 10 *Bosw.*, 622.

3. Term-fees are not taxable for terms during which the cause was reserved generally, not by order of the court, but by a consent filed. *N. Y. Superior Ct.*, 1863, Crawford *a.* Kelly, 10 *Bosw.*, 697.
4. No more than five terms in the Court of Appeals are taxable. *Supreme Ct., Third Dist.*, 1862, Richmond *a.* Sherman, 28 *How. Pr.*, 491.
5. The awarding costs is not in the discretion of the court, on affirming, on appeal, an order denying a new trial, or on affirming a judgment in whole. *N. Y. Superior Ct.*, 1863, Clarke *a.* Meigs, 10 *Bosw.*, 337.
6. The costs of an appeal to the Court of Appeals are to be taxed according to the law at the time of the decision of that court, or when the judgment of the Court of Appeals is made the judgment of the Supreme Court. *Supreme Ct.*, 1865, Ackley *a.* Tarbox, *Ante*, 119.
7. Only five term-fees can be allowed, even where, after they had accrued, a new trial became necessary, and the cause was again on the calendar. *N. Y. Superior Ct., Sp. T.*, 1865, Hamilton *a.* Butler, *Ante*, 446.
8. Where, after trial, the jury are discharged without rendering a verdict, and the cause is set down for another term, the second trial is not within the provisions of the Code, which allow costs of subsequent proceedings before a new trial, where a new trial has been "granted." *Ib.*
9. The cost of copies of the stenographer's notes of the first trial, for the use of a party on a second trial, is not taxable as a disbursement. *Ib.*
10. A trial-fee is taxable, whether the trial results in a verdict or not. *Ib.*
11. Where a cause is tried several times, a trial-fee for each is taxable. *Ib.*
12. Of the power of courts of equity to allow costs to trustees, and the rules by which the power was exercised. Rose *a.* Rose Association, 28 *N. Y.*, 184.
13. If a person, holding a fund to which several others make conflicting claims, refuses to pay it to either of them on demand, without assigning any reason for such refusal, and litigates an action brought against him by such a claimant, without offering to pay the money into court, he is not entitled to be allowed his costs out of the fund, but may be charged with them personally. *Supreme Ct.*, 1864, Bevier *a.* Schoonmaker, 29 *How. Pr.*, 411.
14. Parties to an action for the construction of a will who do not prosecute or defend as trustees, or in *autre droit*, are not entitled to an al-

lowance of "trustees' costs," to be paid out of the estate. Whatever may have been the practice of the English chancery as to allowing trustees' costs to parties to actions for the construction of wills or relating to charities, other than trustees, or others suing or defending in *autre droit*, it was not the rule in this State, such parties being allowed their taxable costs, and no more. [1 Johns. Ch. R., 153; 4 Ib., 608; 4 Paige, 87; 9 Ib., 533; 9 Ib., 461; 4 Ib., 271.] The Code certainly has not enlarged the rules relating to costs in such cases, if it has not restricted them. *Ct. of Appeals*, 1863, Rose *a.* Rose Association, 28 *N. Y.*, 184.

15. A party who attends the trial of his cause solely as a witness, and is sworn and examined as such, is entitled to witness fees. [Citing conflicting authorities.] *Supreme Ct., Eighth Dist.*, Van Duesen *a.* Bissell, 29 *How. Pr.*, 481.

16. A sheriff cannot be allowed an additional compensation for executing an attachment, over and above his prescribed fees, unless he is put to trouble or incurs expenses in taking possession of, or in preserving the property attached. He is not entitled to poundage, if he has not attached any property he could sell by virtue of the attachment. *Supreme Ct.*, 1865, Calhoun *a.* Lee, 29 *How. Pr.*, 1. But compare Code of Procedure, section 243, as amended by the *Laws of* 1865, ch. 615, cited 18 *Ante*, 498.

17. Of the power of the court in granting extra allowances. People *a.* N. Y. C. R. R. Co., 29 *N. Y.*, 418.

18. An extra allowance of costs under section 309 of the Code cannot be granted on an application made after the general costs in the action have been adjusted, the judgment perfected, and the judgment-roll filed. The application comes too late. *Supreme Ct.*, 1864, Clarke *a.* City of Rochester, 29 *How. Pr.*, 97. Compare People *a.* N. Y. Central R. R. Co., 29 *N. Y.*, 418.

APPEAL, 4, 5, 8, 9; ATTORNEY, 6, 7, 8.

COUNTY MEDICAL SOCIETIES.

Power of expulsion, and remedy for abuse of it. People *a.* Medical Society, 32 *N. Y.*, 187.

COUNTIES.

After a claim against a county has been presented to the Board of Supervisors for allowance, and has been examined and passed upon by that

body, the amount determined to be actually and justly due declared, and its payment provided for in the mode prescribed by law, no action will lie against the county, to recover the same claim, upon the ground that the decision of the board was erroneous in respect to the amount actually and legally due to the plaintiff. Their action in the matter is final and conclusive. [10 N. Y., 260.] *Ct. of Appeals*, 1864, Martin *a.* Supervisors of Greene Co., 29 *N. Y.*, 645.

COUNTER-CLAIM.

A counter-claim interposed by the defendant, though it be admitted by the plaintiff, by failing to controvert it, will not entitle the defendant to a judgment for the full amount thereof, unless the plaintiff fails to establish his cause of action; and he can only recover the excess over the plaintiff's recovery, where the plaintiff succeeds as to any part of his claim. The plaintiff, by omitting to reply to a counter-claim, only admits that every material allegation constituting it "shall, for the purposes of the action, be taken as true." The effect of that admission is, that the amount so counter-claimed may be deducted from the plaintiff's claim; but it by no means concedes that the defendant shall be entitled to the recovery of the entire sum, irrespective of the demand made by the complaint. *Supreme Ct., Sp. T.*, 1865, Kelsy *a.* Tremaine, 29 *How. Pr.*, 439.

COUNTY CLERKS.

Fees of the clerk of the county of Kings. *Laws of* 1865, 1425, ch. 113.

COURT.

Where an authority is created by statute, with power to fine or imprison, the officer, person, or body invested therewith is, for that purpose, deemed a court. *N. Y. Com. Pl., At Chambers*, 1865, Case of The Twelve Commitments, *Ante*, 394.

COURT OF APPEALS; COURTS OF SESSIONS; DISTRICT COURTS; JUDGE; MARINE COURT.

COURT OF APPEALS.

1. The Court of Appeals will not postpone the argument of a cause on the ground that it was inconvenient for one of the parties to prepare

for the hearing. The rules prescribe the only cases for postponing argument. If the opposite party is unprepared, he is at liberty, under the rule, to submit a printed argument. *Ct. of Appeals*, 1865, Bank of Salina *a.* Alvord, 32 *N. Y.*, 684.

2. Where the appellant fails, either to appear when his cause is reached, or afterwards to submit points in accordance with the 25th rule, the judgment below should be affirmed of course. *Ct. of Appeals*, 1863, Kelly *a.* McCormick, 28 *N. Y.*, 318.
3. Where it appeared by affidavit, on moving the case for argument, that the suit had abated by the death of the respondent,—*Held*, that the cause should stand over to the next term without prejudice, and with leave to move for substitution. *Ct. of Appeals*, 1865, Shaler & Hall Quarry Co. *a.* Brewster, 32 *N. Y.*, 472.
4. An appeal should be dismissed, if there are no exceptions or case contained in the printed papers. *Ct. of Appeals*, 1865, Enos *et al. a.* Eigenbrodt *et al.*, 32 *N. Y.*, 444.
5. Motions for reargument should be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel. *Ct. of Appeals*, 1865, Mount *a.* Mitchell, 32 *N. Y.*, 702.
6. A rule for judgment, made by a judge before whom the cause was tried without a jury, may be construed as the finding of certain facts necessary to sustain the judgment, not stated in his findings of fact. *Ct. of Appeals*, 1863, Rider *a.* Powell, 28 *N. Y.*, 310.
7. Upon appeal from a judgment, where there has been no motion for a new trial on a case on exceptions, the court, at general term, can reverse only upon the law; and on an appeal from their reversal to the Court of Appeals, the latter court will presume that the court did not differ with the jury on questions of fact. *Ct. of Appeals*, 1865, Magee *a.* Osborn, 32 *N. Y.*, 669.
8. Judgments not to be reversed by this court for alleged errors which are trivial and not apparent. Ashley *a.* Marshall, 29 *N. Y.*, 494.
9. In the case of an appeal from a judgment entered on the report of a referee, it is only in clear cases that the Court of Appeals exercises the power of reversing the judgment on the ground of a failure of the proof to sustain the findings of fact, when the findings of fact have been approved in court below. *Ct. of Appeals*, 1865, Metcalf *a.* Mattisons, 32 *N. Y.*, 464.
10. An order granting an extra allowance of costs is not reviewable in

the Court of Appeals, especially on an appeal before judgment. *Ct. of Appeals*, 1865, McGregor *a.* McGregor, 32 *N. Y.*, 479.

11. Orders denying motions to set aside a verdict are not reviewable in the Court of Appeals, on appeal from the judgment. They are not intermediate orders involving the merits, and necessarily affecting the judgment, within subdivision 2 of section 11 of the Code of Procedure. They are not intermediate orders in any sense, but entirely outside of the judgment. They are not summary applications after judgment, within the 3d subdivision of the same section. That provision only relates to orders which recognize the original regularity and validity of the judgment, and are based on facts and circumstances occurring subsequently. But if that were not so, such motions are addressed to the discretion of the court below, and for that reason cannot be reviewed here. (Per SELDEN, J.) *Ct. of Appeals*, 1864, Selden *a.* Delaware & Hudson Canal Co., 29 *N. Y.*, 634.

12. Where there are no exceptions contained in the case, as settled, nor any allusion to any, as having been taken at any time, there is nothing for the Court of Appeals to review. [3 Kern., 341; 4 Ib., 435.] *Ct. of Appeals*, Weed *a.* N. Y. & Harlem R. R. Co., 29 *N. Y.*, 616.

13. Where the only exceptions taken relate exclusively to the finding of the referee upon matters of fact—no exception being taken to the decision upon the law—they present no question which the Court of Appeals can review, according to the settled practice. *Ct. of Appeals*, 1864, Weed *a.* N. Y. & Harlem R. R. Co., 29 *N. Y.*, 616.

14. Duty of outgoing reporter to deliver to his successor opinions and cases, which are not necessary to complete partly printed volume. No such opinions to be published, except as is provided by law. Opinions not directed by the court to be reported, to be filed with the clerk. *Laws of* 1865, 1120, ch. 555.

APPEAL.

COURT OF SESSIONS.

1. The Court of Sessions, after the affirmance of judgment by the Court of Appeals, on a writ of error, have power to pass a full sentence anew, if the day fixed by the original sentence of execution has passed. *Supreme Ct., At Chambers*, 1865, Walters *a.* People, *Ante*, 212.

2. A Court of Special Sessions, held under the act of 1857, ch. 769, § 1 [3 Rev. Stat., 5th ed., 1000], has no jurisdiction of a charge of "malicious mischief." *Supreme Ct.*, 1861, Wait *a.* Green, 5 *Park. Cr.*, 185.

3. In the statute, the phrase "wilful trespass" does not describe any crime, except as such an act is made such by statute. There are

certain wilful trespasses, which are indictable and punishable, and the present statute refers to these only. And it seems that the trespasses referred to are acts of trespass upon lands. *Ib.*

4. The Court of Special Sessions of the peace in and for the city and county of New York, to be held by the two police justices of the second and sixth judicial districts of said city and county. *Laws of* 1865, 1132, ch. 568.

5. Powers and duties of the justices: In case of the sickness, absence, or disability of either, the other may hold the court. *Ib.*

6. Organization of Court of Sessions under a special act. Nelson *a.* People, 5 *Park. Cr.*, 39; affirmed, 23 *N. Y.*, 293.

COMMITMENT.

COVENANT.

1. A covenant to keep up a partition fence is a covenant running with the land; and where it imposes a liability other than that imposed by the statute as to "division fences," it is an encumbrance, within the meaning of a covenant to convey free of all encumbrance. *Supreme Ct,. Sp. T.*, 1864, Blain *a.* Taylor, *Ante*, 228.

2. An agreement by the owner of land, with a railroad company, under the statute, to make and repair fences along the road running through his farm, is a covenant running with the land, and is within the meaning of the covenant to convey free of all encumbrance. *Ib.*

CAUSE OF ACTION.

CREDITORS' ACTION.

1. A court of equity does not intervene to enforce the payment of debts (whether individual or partnership debts); and it is only after the creditor has taken and exhausted all the means in his power at law, that he will be entitled to its aid to discover and apply the debtor's property to satisfy his claims. A creditor at large has no status in the court; and the right of a judgment creditor to relief depends upon the fact of having exhausted his legal remedies without being able to obtain satisfaction of his judgment. An execution must have issued on the judgment, and been returned unsatisfied. This is essential to the jurisdiction of the court, though there be nothing that can be reached by execution at law. When the attempt is to reach and enforce payment of the judgment out of the equitable interests of the judgment debtor, the creditor must have acquired an equitable lien, in this way, before chancery can or will entertain jurisdiction. *Ct. of Appeals*,

1865, Dunlevy *a.* Tallmadge, 32 *N. Y.*, 457; reversing S. C., *sub nom.* Fassett *a.* Tallmadge, 18 *Abbotts' Pr.*, 48.

2. An action by a creditor to enforce the trust which is raised by the statute in favor of the creditors of a person, paying the consideration of a purchase of land conveyed to a third person [1 Rev. Stat., 728], is not an ordinary creditor's action, within the rule that the plaintiff must show his remedy at law to be exhausted. The power of equity of granting equitable relief in cases of fraud, by enforcing the rights springing from mere trusts, whether created by will, by deed, or by operation of law, is a jurisdiction entirely independent of that exercised under the special authority of the statute to grant ancillary relief to judgment creditors in aid of their remedies at law. *Ct. of Appeals*, 1865, McCartney *a.* Bostwick, 32 *N. Y.*, 53.
3. Where the debtor was a non-resident,—*Held*, that it was enough for the plaintiff to show, in such action, that all remedies at law were exhausted against the debtor, in the State in which he resided; and that in this State no legal remedy was available. *Ib.*
4. A creditor having an attachment against his debtor, but not having proceeded to judgment, cannot maintain an action to set aside a fraudulent assignment of a bond and mortgage by his debtor, for such securities could not be sold on execution. It has been frequently held, that the lien acquired by the levy of an attachment under the Code, even on chattels alleged to have been fraudulently assigned, would not alone authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment action. [24 Barb., 105; 11 Abbotts' Pr., 220; 30 Barb., 552; 13 N. Y., 488.] *Supreme Ct., Sp. T.*, 1865, Mechanics' and Traders' Bank *a.* Dakin, 28 *How. Pr.*, 502. Compare, ATTACHMENT, 2.
5. Mere creditors at large cannot file a bill in equity to reach the assets of their debtors; and in this respect there is no distinction between simple contract creditors of an individual and those of a copartnership. [4 Johns. Ch., 387; 8 Barb., 593; 3 Kern., 167.] Insolvency of a general and ordinary partnership, where accompanied by a disposition of the firm property with the intent of keeping it from creditors, gives the partnership creditors no lien, nor is the property, under such circumstances, converted into a trust fund for their benefit, nor will the alienee or purchaser be deemed in equity to hold it as their trustee. Joint creditors, it is true, under certain circumstances, have a right of priority of payment out of partnership property in preference to the private creditors of any separate partner, but this equity is generally to be worked out through the medium of the partners. They have no lien upon partnership effects, until such effects are taken into the

custody of the law by due process [6 Vesey, 119], and can only acquire an equitable lien by proceeding to judgment and execution against the firm, and, if the property sought was *choses in action* or equitable interest, beyond the reach of the execution, having the same returned unsatisfied. It is only after the creditor has completed his title at law, by judgment and execution, that he can question in equity the disposition of his debtor's property; and it is only by the actual return of the execution unsatisfied, that he acquires an equitable lien upon it, or a court of equity has power to intervene. *Ct. of Appeals*, 1865, Dunlevy *a.* Tallmadge, 32 *N. Y.*, 457; reversing S. C., *sub. nom.* Fassett *a.* Tallmadge, 18 *Abbotts' Pr.*, 48.

6. Where the wife of a debtor joins with him in the execution of a fraudulent conveyance of his real property to a third person, who reconveys to her, and the conveyances are set aside at the suit of a creditor, she is not entitled to have her dower reserved to her by the judgment. *N. Y. Superior Ct.*, 1863, Meyer *a.* Mohr, *Ante*, 299.

CRIERS.

Appointment of criers in courts of record. *Laws of* 1865, 474, ch. 296.

CRIMES.

An act in relation to the punishment of criminal offences. *Laws of* 1865, 347, ch. 212.

DEFENCES.

1. A defect of parties, to be available in an action for tort, must be raised by defendant's pleadings. *Ct. of Appeals*, 1864, Creed *a.* Hartman, 29 *N. Y.*, 591; S. P., *Ct. of Appeals*, 1863, Hosley *a.* Black, 28 *N. Y.*, 438; 1865, Merritt *a.* Walsh, 32 *N. Y.*, 685.
2. The objection that plaintiff has no legal capacity to sue—*e. g.*, a married woman suing without a next friend, before the act of 1857—is waived, if not taken by pleading. *Ct. of Appeals*, 1863, Palmer *a.* Davis, 28 *N. Y.*, 242.
3. The failure of goods sold, to correspond with a description or warranty of them, in the contract of sale, does not constitute a defence, either as a failure of consideration or breach of warranty, to the liability of a third party upon a promissory note given by him and accepted as payment of the price of such goods. Any remedy for such misrepresentation or breach of warranty is confined solely to the purchaser by

action against the seller. *N. Y. Superior Ct.*, 1863, Delans *a.* Rawson, 10 *Bosw.*, 286.

4. It is not a defence to an action to restrain an action of ejectment—and to have the instruments under which the plaintiff in ejectment claims, set aside as a cloud on the title, and for other relief—that the facts might have been set up as a defence in the ejectment suit. *Ct. of Appeals*, 1864, Liemon *a.* Schurck, 29 *N. Y.*, 598.
5. Where one is arrested, tried, and convicted for an act which, if it were an offence, was one of which the court had no jurisdiction, his imprisonment cannot afterwards be justified by showing that the evidence at the trial would have convicted him of another offence which was triable in that court. *Supreme Ct.*, 1861, Wait *a.* Green, 5 *Park. Cr.*, 165.
6. Alleged defects in the proceedings to organize a corporation are not available to defeat an action brought by the corporation for a trespass in wrongfully taking property from their possession. *N. Y. Superior Ct.*, 1863, Persse & Brooks Paper-works *a.* Willett, *Ante*, 416.

LIMITATIONS; MUNICIPAL CORPORATION, 2.

DEMAND BEFORE SUIT.

1. Where one holding an executory contract for the sale to him of merchandise, assigns it to third persons, and the vendor in the contract tenders performance directly to the latter, a demand by them for the performance of a condition precedent on the part of the vendor, must be made upon the vendor, and not alone upon the assignor of the contract. *N. Y. Superior Ct.*, 1863, Dustan *a.* McAndrew, 10 *Bosw.*, 131.
2. When a party to a contract, which is void by the Statute of Frauds for not being in writing, refuses to perform, placing his refusal solely upon the ground of inability to do so, and the other party is not in default, the former cannot maintain an action against the latter to recover back money paid under the contract, without making a demand for its repayment before suit. [Fry on Specif. Perf., §§ 339, 340; 4 Den., 51.] *N. Y. Superior Ct.*, 1863, Wakeman *a.* Gowdy, 10 *Bosw.*, 208.
3. Of the necessity of demand before suit against brokers for selling stock of their employers without authority. Clarke *a.* Meigs, 10 *Bosw.*, 337.

DEMURRER.

1. The ground of demurrer allowed by the Code (§ 144), "that there is a defect of parties plaintiff or defendant," does not reach a case where there are too many plaintiffs, or too many defendants; but only those cases in which, from the statement of the cause of action, it appears that there are parties omitted, who should have been made parties plaintiff or defendant. It is the same as non-joinder of a necessary party, in an action at law, under the superseded system, or the omission of a necessary party in a suit in equity. *Ct. of Appeals*, 1863, Palmer *a.* Davis, 28 *N. Y.*, 242.
2. On demurrer to an answer for insufficiency, the defendants are at liberty to attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. [8 How. Pr., 261; 12 Barb., 573; Code, §§ 144–148.] *Ct. of Appeals*, 1865, People *a.* Booth, 32 *N. Y.*, 397.

DISCOVERY AND INSPECTION.

1. The court have no power, on motion, to compel a party to an action to submit articles which are the subject thereof, and are neither books, documents, nor evidence of themselves, to be inspected by third persons, in order to enable them thereby to qualify themselves to testify as experts, in the action, for the party applying, as to the mere quality of such articles. *N. Y. Superior Ct.*, 1863, Ansen *a.* Tuska, *Ante*, 391.
2. An affidavit, to support an order for the discovery of books and papers, must state specially what information is wanted, and that the books and papers referred to contain such entries; and must state this positively, not on information and belief; and the absence of a party will not excuse the want of such positive affirmation, unless the affidavit at least sets forth the sources and grounds of such information and belief. *Supreme Ct.*, 1865, Walker *a.* Granite Bank, *Ante*, 111.
3. Thus, in an action against a bank, to recover money received by it from the sale of securities deposited with it, the court will not order a discovery of entries in its books, merely upon an affidavit of the plaintiffs, allowing that he is informed and believes that there are entries relating thereto. *Ib.*
4. An order, directing the deposit of certain papers and "all other

books which contain any accounts or entries, showing or tending to show" certain matters, is improper and unwarranted, it being an attempt to use the power of the court for the mere purpose of hunting for evidence. *Ib.*

DISCHARGE.

1. The discharge of an insolvent under the insolvent laws of his own State is a bar to an action in the courts of such State by a citizen of another State, upon a contract made or to be executed in the State wherein such discharge was granted after the law was enacted. *Supreme Ct.*, 1865, Pratt *a.* Chase, *Ante*, 150.
2. Objections to defects in the proceedings for an insolvent's discharge of a merely formal nature must be taken by certiorari, and cannot be taken in a collateral action. *Ib.*

PARTIES, 6.

DISMISSAL OF COMPLAINT.

1. Under the liberal rules of pleading established by the Code of Procedure, a complaint should not be dismissed upon the trial, because it is indefinite or uncertain, or contains irrelevant or redundant matter. *Supreme Ct.*, 1865, Simmons *a.* Eldridge, *Ante*, 296.
2. Allegations of a complaint in a creditor's action, *held* sufficient under this rule. *Ib.*
3. In an action for an injury to the person, caused by the negligence of the defendant, the court is warranted in dismissing the complaint because of the plaintiff's own negligence, only where such negligence is clearly proved. *Ct. of Appeals*, 1864, Creed *a.* Hartman, 29 *N. Y.*, 591.
4. A creditors' action should not be absolutely dismissed for defect of parties, unless the objection be taken by pleading. (Per MCCUNN, J.) Loeschigk *a.* Addison, *Ante*, 169.
5. When a non-resident plaintiff fails to obey an absolute order to file security for costs, the court may grant a judgment of *non pros.* *Supreme Ct.*, 1865, Hinds *a.* Douglass, *Ante*, 11.
6. Though the order for security was obtained on a motion by a part only of the defendants, the complaint may be dismissed as to all, on the plaintiff's failure to comply. *Ib.*

DISORDERLY PERSONS AND CONDUCT.

COMMITMENT.

DISTRICT ATTORNEY.

Duty to prosecute for penalties under Metropolitan Police Law for illegal sales of liquor: What are county charges. People *a.* Supervisors of N. Y., 32 *N. Y.*, 473; reversing S. C., 18 *Abbotts' Pr.*, 8.

DISTRICT COURTS (OF NEW YORK).

1. Number and respective districts of the courts defined. *Laws of* 1865, 1897, ch. 688, amending *Laws of* 1857 and 1848.
2. Where an affidavit is required by law to be taken before the clerk of a District Court, it may be taken before the deputy, and the latter may in such case properly sign the name of the clerk. *Supreme Ct.*, 1865, People *a.* Powers, *Ante*, 99.

DIVORCE.

1. The provisions of 2 Rev. Stat., 147, section 53—declaring that in an action for a limited divorce, if the defendant establishes recrimination, the court shall dismiss the bill—preclude the court from proceeding, after such defence has been established, to award alimony and dispose of the custody of the children. *Buffalo Superior Ct.*, 1865, Palmer *a.* Palmer, 29 *How. Pr.*, 390.
2. An offer by a wife to return to her husband and live with him, made pursuant to an order of court for her support in lieu of an allowance, or, if not accepted, or made upon conditions which the husband does not comply with, is not a condonation of his previous cruel treatment and abandonment of her. *N. Y. Superior Ct.*, 1864. Betz *a.* Betz, *Ante*, 90.
3. A supplemental answer in an action by her for a limited divorce, setting up only such facts, does not show a defence; and leave to put in such an answer should be refused. *Ib.*

EJECTMENT.

An action by a married woman against her husband, to recover possession of her house, which forms part of her separate estate, cannot be sustained upon the mere proof of her title. *N. Y. Common Pleas*, 1865, Gould *a.* Gould, 29 *How. Pr.*, 441.

ELECTION OF REMEDIES.

Under a contract to purchase a certain quantity of merchandise within a specified period, at the purchaser's option, if he refuses to perform it within the time fixed, the remedy is twofold—either to hold the goods subject to his order, and at once sue him for the contract price; or to sell them, after notice to him, for the best price which can be obtained, and sue for the difference between that and the contract price. *N. Y. Superior Ct.*, 1863, Dustan *a.* McAndrew, 10 *Bosw.*, 131.

EQUITY.

A court of equity may reform a written contract upon parol evidence of fraud or mistake, although the contract is one which the Statute of Frauds requires to be *in writing* [reviewing several authorities]. *Ct. of Appeals*, 1863, Rider *a.* Powell, 28 *N. Y.*, 310.

It seems, that the mistake must be mutual, or fraud on the defendant's part must be shown, to entitle the plaintiff to such relief. *Ib.*

CAUSE OF ACTION; CLOUD ON TITLE; CREDITORS' ACTION; JURISDICTION, 4.

ERROR (WRIT OF).

1. The proceedings of a County Court of Sessions on the trial of an indictment, will not be reviewed on writ of error by the Supreme Court until a record of judgment shall have been made up and filed. Where the return to a writ of error was defective in this respect, on motion of the district attorney, the writ of error was quashed. *Supreme Ct.*, 1865, Dawson *a.* People, 5 *Park. Cr.*, 118.
2. Where an irregularity affecting the trial has not been introduced into the record or proceedings, so as to constitute it a proper subject to be returned to the court of review, upon a writ of error or certiorari—*e.g.*, in the case of an incompetency of a juror by reason of previously expressed opinions, which did not come to the knowledge of the prisoner or his counsel previous to the verdict—the question as to such irregularity may be raised by affidavits presented to the appellate court after return to the writ. *Supreme Ct.*, 1864, Willis *a.* The People,* 5 *Park. Cr.*, 621.
3. In the appellate court, the charge of the judge on the trial should be

* Affirmed on other grounds, 33 *N. Y.*, 715.

interpreted in the light of the evidence, and in accordance with the ordinary and popular import of the language, as it would naturally be understood by the jury. And erroneous instructions by the judge will not authorize the reversal of the judgment, where it appears from the form of the finding, as matter of legal necessity, that the error did not affect the result, and wrought no actual prejudice to the party. *Ct. of Appeals*, 1865, People *a.* Bransby, 32 *N. Y.*, 525.

4. After a regular and legal conviction, an appellate court, upon reversing the judgment upon a writ of error, upon the ground that the sentence and judgment were erroneous, have power (under the act of 1863) to remit the record, and direct the court below to pass the proper sentence; and this power may be exercised where the writ of error was brought after the passage of that act, although the conviction was had before it passed. *Ct. of Appeals*, 1865, McKee *a.* The People, 32 *N. Y.*, 239.
5. Where, after sentence in a criminal case in a Court of Sessions, the judgment is reviewed upon writ of error, and affirmed, in the Court of Appeals, and the day for execution fixed by the sentence has passed, it is competent for the Court of Appeals, in remitting the record, to direct the Court of Sessions to sentence the prisoner anew. *Supreme Ct., at Chambers*, 1865, Walters *a.* People, *Ante*, 212.
6. This may be done as well by remitting the proceedings to the Supreme Court, with directions to that court to remit them in turn to the Court of Sessions, as by remitting them to the Court of Sessions in the first instance. *Ib.*

ESCAPE.

Distinction between escapes and recapture in criminal and civil cases. People *a.* Cyphers, 5 *Park Cr.*, 666.

ESTOPPEL.

1. The rule, that where the true owner of land tacitly suffers another person to occupy and improve the same without interposing his own claim, he will be barred in equity from claiming the property, without compensation for the improvements, does not apply where his acts or silence have not misled such other party. *N. Y. Superior Ct.*, 1865, Christianson *a.* Sinfard, *Ante*, 221.
2. Where the person encroaching knows what he is doing, it is not necessary for the true owner, in order to protect his rights, to give notice to desist. *Ib.*
3. The owner of real property being applied to by one who had fur-

nished certain fixtures for which he had not been paid, for leave to enter and remove them, gave him to understand that he himself had no objection, but that he could not give his express consent for fear of trouble with the mortgagees. *Held*, that this was not a license to remove them, and that he was not thereby estopped from suing him for their removal. *N. Y. Superior Ct.*, 1863, Sparks *a.* Leavy, *Ante*, 363.

FORMER ADJUDICATION.

EVIDENCE.

I. *Presumptions and Burden of Proof.*

1. Presumptions in a case of the killing of an officer by a person pursued by a mob threatening his life. Yates *a.* People, 32 *N. Y.*, 509.
2. The Supreme Court, in the appointment of a receiver under 2 Rev. Stat., 463, § 36 (Of proceedings against corporations in equity), acts as a court of general jurisdiction, and not as exercising a special statutory power; and the pendency of the action, in which the order appointing the receiver was made, may be proved by the recitals in the order. The decisions of the courts agree that a recital in the record, of appearance, or of service of process, is evidence of the fact recited, and they differ only as to whether the fact recited is conclusive, or only *prima facie*. Our courts hold the recital *prima facie* only. In the absence of any recital, the law presumes that the court had jurisdiction to make the order in question. When an order is made appointing such officer, the presumption is that all things were done required by the statute to be done in order to authorize it to make such order. *Ct. of Appeals*, 1864, Potter *a.* Merchants' Bank, 28 *N. Y.*, 641.
3. Presumptions and burden of proof of negligence in action against railroad company for dropping coals from engine. Field *a.* N. Y. C. R. R., 32 *N. Y.*, 339.
4. The burden of proof is upon an assignee sued for rent, to show that the lessees, his assignors, have paid the rent, if he relies on that fact. *N. Y. Superior Ct.*, 1863, Jones *a.* Hausemann, 10 *Bosw.*, 168.
5. The fact that the seller of a note offered it for a less sum than at the legal rate of discount, is not sufficient to impose upon the buyer, when he sues thereon, the burden of proving inquiry as to the validity of the note. *Supreme Ct.*, 1865, Mechanics' Bank of Williamsburgh *a.* Foster, *Ante*, 47.

II. *Opinions of Witnesses.*

6. Opinions of witnesses are not admissible as to the value of choses in action. The proper inquiry is as to the solvency of the debtors. *Ct. of Appeals*, 1864, Potter *a.* Merchants' Bank, 28 *N. Y.*, 641.

7. In order to prove what article was intended in a contract, by a name used in commerce, it is proper to ask a witness, who is an expert, "how the article is generally known in the market? and how spoken of generally?" *N. Y. Superior Ct.*, 1862, Pollen *a.* Leroy, 10 *Bosw.*, 38.

8. In proving negligence of a factor in selling breadstuffs without waiting for a rise in prices, the testimony of a witness, that after the sale he had heard, at the place of sale, that the potato blight was the subject of general conversation among merchants there, previous to the time of the sale, is inadmissible, as being mere hearsay evidence. But the testimony of witnesses qualified to testify on the subject, of their own knowledge and opinion of the causes which affected the price of flour at that time, is admissible. *N. Y. Superior Ct.*, 1863, Milbank *a.* Dennistoun, 10 *Bosw.*, 383.

9. A witness cannot be allowed to testify, in an insurance case, what is meant by a "permanent policy," it not appearing to be a term of art, or one employed in any particular business, and it not being shown that the witness has any qualifications for interpreting it, which are not equally possessed by the judge and jury. *Ct. of Appeals*, 1863, Baptist Ch. *a.* Brooklyn Fire Ins. Co., 28 *N. Y.*, 153; affirming S. C., 23 *How. Pr.*, 448.

10. The testimony of experienced navigators, as well as that of shipwrights, is admissible on questions involving nautical skill, as to the nature and ordinary effects of the perils to which a marine loss is attributed. *Ct. of Appeals*, Walsh *a.* Washington Ins. Co., 32 *N. Y.*, 427.

11. The master of a vessel, in the course of his examination, after detailing the particulars of the disaster, was asked to what the loss was attributable. *Held*, that this was admissible. The witness was testifying to matters within his personal knowledge, and was just as competent to prove a fact directly in issue, as one only incidentally involved. [12 Moore, 157.] *Ib.*

III. *Parol Evidence.*

12. In an action which was to recover for merchandise sold and de-

livered, the defence being that the purchase was made of a third person, under a special contract, which had not been fulfilled;—*Held*, that it was not error to exclude parol evidence to explain an ambiguity in the special contract in question, where there was no averment in the pleadings to which the proof would apply, and the defendants have not, by proof, connected the plaintiff with such contract, so as to affect him by notice of its existence. [3 Johns., 170; 3 Hill, 251; 2 Hill, 578; 1 Sandf., 260; 7 Barb., 271; 3 Bosw., 520.] *N. Y. Superior Ct.*, 1863, Lewis *a.* Blake, 10 *Bosw.*, 198.

13. Parol evidence of a usage or agreement on the part of the insurer to receive payment of premiums after the day upon which they were due, will not suffice to vary the written contract. *N. Y. Superior Ct.*, 1865, Howell *a.* Knickerbocker Life Ins. Co., *Ante*, 217.

14. In what cases a trust in respect to real estate may be established by parol evidence. Swinburne *a.* Swinburne, 28 *N. Y.*, 568.

IV. *Documentary Evidence.*

15. A charter of a private corporation, enacted by the Legislature of another State, is a law, within the meaning of section 426 of the Code of Procedure, which declares that "printed copies in volumes of statutes, Code, or other written law" of other States, shall be admissible in evidence in the courts of this State. *N. Y. Superior Ct.*, 1863, Persse & Brooks Paper-works *a.* Willett, *Ante*, 416.

16. Evidence of protest of foreign bill, note, or check may be according to the laws of the place where it was done. *Laws of* 1865, 516, ch. 309.

17. Record of bill of sale, mortgage, hypothecation, or conveyance of a vessel of the United States recorded in the collector's office where the vessel is registered or enrolled, or a certified copy, to be evidence equally as the original, provided that its execution shall have been acknowledged or proved in the same manner as a conveyance of real estate in this State. *Laws of* 1865, 903, ch. 512; amending *Laws of* 1862, 450, ch. 251.

18. *It seems*, that the statute providing for filing chattel mortgages or copies, and renewal statements, makes certified copies thereof evidence of the fact, only, that such instrument or copy, and the statement, were received and filed according to the indorsement of the clerk thereon, and of no other fact; and, so also, that the original indorsement by the clerk is to be received as evidence only of the facts stated in such indorsement. Such evidence is no proof of the existence of the mortgage. That must be produced and proved, or its non-production accounted for so as to authorize secondary evidence. Nor is the certificate of the clerk any evidence that the paper purporting to be a copy

of the mortgage, is a copy. The mortgage and its contents must be proved by common-law evidence. *Ct. of Appeals*, 1863, Bissell *a.* Pearce, 28 *N. Y.*, 252.

19. Competency of original entries made by a witness; and the use of memoranda to refresh the memory of a witness. Marcly *a.* Shultz, 29 *N. Y.*, 346.

20. In an action to recover for work done, and materials furnished, in various parts of a building, under a special contract requiring the plaintiff to conform to plans and specifications which formed part of the contract, other plans, as well as maps and drawings, exhibiting the various parts of the building and premises on which the work was to be done, are admissible in evidence, as introductory to testimony; and a question to a witness whether such a plan is correct, though leading, is still proper, as mere inducement. *N. Y. Superior Ct.*, Stuart *a.* Binsse, 10 *Bosw.*, 436.

21. The fact that work alleged to have been done by the plaintiff is delineated on the plan exhibited, does not render such evidence improper where no objection is taken to a general question as to the correctness of the plan, and a witness had testified that he could supply the lines representing the plaintiff's work, in court, if they were not laid down on the plan. *Ib.*

22. Entries in partnership books are not evidence for one partner against another, on an accounting between them, unless it appears, or may be presumed, that the latter not only had access to the books, but actually inspected them. (BOSWORTH, Ch. J., dissented.) *N. Y. Superior Ct.*, Taylor *a.* Herring, 10 *Bosw.*, 447.

V. *Particular Facts and Issues.*

23. In order to establish title to land, under a lease by the corporation of the city of New York, for non-payment of taxes, it is necessary to show that every prerequisite to the power to sell had been complied with. The production of what purport to be the assessment-rolls, without proof of their authenticity or the genuineness of the assessors' signatures, is not sufficient evidence that the taxes therein mentioned were duly imposed. *N. Y. Superior Ct.*, 1862, Stevens *a.* Palmer, 10 *Bosw.*, 60.

24. The negative testimony of witnesses familiar with a certain commodity, who have long dealt in it, that they never saw any of a specified brand, may be weighed against testimony of another witness that he had seen it, in determining whether such brand existed and was

known in the market. *N. Y. Superior Ct.*, 1862, Pollen *a.* Leroy, 10 *Bosw.*, 38.

25. The provision of Laws of 1855, ch. 546, § 1—declaring that in any action brought by any plankroad company, organized under the laws of this State, which shall have been in actual operation, and being in possession of a road upon which they have taken toll for five consecutive years next preceding the commencement of the action, parol proof of such corporate existence and use shall be sufficient for all purposes of the action, unless the opposing party shall set up a claim in his answer duly verified, of title in himself to the road or to some part thereof—contemplates a claim of actual title, not of a mere easement. *Ct. of Appeals*, 1865, Belfast, &c., Plankroad Co. *a.* Chamberlain, 33 *N. Y.*, 651.

26. Rules of evidence applicable in an action by reversioner for trespass and injury to real property. Van Deusen *a.* Young, 29 *N. Y.*, 9.

27. Of what is sufficient evidence of an agreement to insure. Audubon *a.* Excelsior Ins. Co., 27 *N. Y.*, 216.

28. In an action for defamation, although evidence of general ill-will is inadmissible, evidence of express malice in the particular publication complained of is admissible; and this is so whether the communication is privileged or not. Thus, testimony is admissible which tends to show that the publications complained of were the result of a malicious feeling entertained by the defendant towards the plaintiff, and that the libellous articles were published to gratify this malicious feeling. *Ct. of Appeals*, 1863, Fry *a.* Bennett, 28 *N. Y.*, 324.

29. In a creditors' suit, the previous issue and return of execution, when requisite, is sufficiently proved by producing the execution with the sheriff's return and the date of filing indorsed thereon, and testimony of a witness that he had seen it on file in the clerk's office. *N. Y. Superior Ct.*, 1863, Meyer *a.* Mohr, *Ante*, 299.

30. Showing that there was some personal property which might have been seized, does not affect the plaintiff's right to maintain the action, unless it be also shown that he knew of its existence, and omitted to levy. *Ib.*

31. The mere fact that partnership property is transferred, in exchange for other property, which is transferred to the members of the firm individually, does not make the transfer *per se* fraudulent; nor is it conclusive evidence of intent to defraud or delay the partnership creditors, if the substituted property is as valuable as that sold, as accessible to process, and as readily convertible into money by judicial proceedings. The mere fact that the title to the substituted property is taken by the members of the firm severally, can only be important in

connection with other evidence tending to show a fraudulent intent. *N. Y. Superior Ct.*, 1863, Persse & Brooks Paper-works *a.* Willett, *Ante*, 416.

32. Upon the question whether the act of partners, in procuring a statute incorporating them and their associates, and in transferring their property to the corporation so formed, was fraudulent as against creditors, it is admissible to prove that, after the firm had made an assignment for the benefit of creditors, one of their number, acting as the chief officer of the alleged corporation, and having, as such, the control of the property, in the presence of the assignee and of the servants of the alleged corporation, assented to the assignee's taking control of the property in virtue of his right as assignee. *Ib.*

33. Upon the question of the good faith of a transfer of their property, by debtors, to a corporation of which they were the officers, their acts and declarations subsequent to the transfer and while in possession, respecting the use and disposal of it, tending to show that they treated it as if still their own, are admissible. *Ib.*

34. After testimony has been elicited from a witness, on an examination by either party, which would require the submission to the jury of the question of fraudulent intent in an assignment made by such witness, it is proper for the adverse party to ask whether the act was done with fraudulent intent; and in answer to such question, it is proper for the witness to state the particular reasons which induced the act, and that he communicated those reasons to his creditors, before the act. *Ib.*

35. In an action by a corporation against a sheriff for levying on its property under process against the persons who composed the corporation, the defence was that such persons had been, as partners, owners of the property; and that, on failing, they formed the corporation, and transferred the property to it with intent to defraud their creditors.

Held, 1. That evidence that, between the time of the transfer and the time of the levy, the corporation made profits in the business, and that before and at the time of the failure of the firm there was a panic in the market, was admissible; but the admission of such evidence did not make it competent to inquire as to the profits of the corporation up to the time of trial.

2. That a witness, having testified that he was in the employment of the firm as superintendent, for a period extending beyond the time of the transfer, might be asked, on cross-examination, if he was superintendent under the corporation.

3. That entries made in the firm's books, by others than the partners, and after they had made a general assignment for benefit of

creditors, and no longer had control of the books, were not admissible. *Ib.*

36. Upon the question of the solvency of the firm in such a case, it is not competent to ask a book-keeper if the books show whether they were solvent. *Ib.*

37. Evidence is not admissible that the paper of the firm was in the hands of street brokers, or of the rate at which it was offered to be sold, or that such facts induced creditors to recall loans made to the firm. *Ib.*

38. Evidence of admissions of the firm that paper was issued by them to be sold or discounted at usury, is only admissible if such declarations were made before the alleged fraudulent transfer. *Ib.*

39. What is sufficient evidence of fraud to avoid a voluntary gift made by a debtor, considered. (Per McCunn, J.) Loeschigk *a.* Addison, *Ante*, 169.

40. Rules of evidence on indictments for seduction. People *a.* Kenyon, 5 *Park. Cr.*, 254.

41. On an indictment for seduction, immaterial evidence of the chastity of the prosecutor having been admitted, may be contradicted by evidence of lewd conduct. *Supreme Ct.*, People *a.* McArdle, 5 *Park. Cr.*, 180.

42. Admissibility of evidence of insurance effected by the prisoner, on a trial for arson. Freund *a.* People, 5 *Park. Cr.*, 198.

Discovery and Inspection; Examination of Parties; Libel; Trial; Witness.

EXAMINATION OF PARTIES.

1. A party to an action may be examined at the instance of an adverse party at any time after advisement has been made of the nature of the claim or the defence. *N. Y. Superior Ct., At Chambers*, 1865, McVickar *a.* Ketchum, *Ante*, 24.*

2. Where the plaintiff applies for such an examination before the pleadings are put in, he should be limited to such evidence as will tend to establish his cause of action; and the defendant he seeks to examine has a right to know the nature and extent of the claim, which the court will secure by requiring the service of a verified complaint before proceeding with the examination. *Ib.*

* On appeal, this decision was affirmed by the court at general term.

EXCEPTIONS.

1. It is not a ground of exception to the report of a referee that the referee has not found certain facts, especially where he was not requested to find them, and has not refused to do so. *Ct. of Appeals*, 1864, Ashley *a.* Marshall, 29 *N. Y.*, 494; affirming S. C., 9 *Ante*, 361.
2. No exception can be taken to the expression of an opinion by the court upon a question of fact. *Supreme Ct.*, 1862, Conraddy *a.* People, 5 *Park. Cr.*, 234.
3. Whether an exception lies to the admission of testimony elicited by questions put by a juror? (Query.) Kelly *a.* Commonwealth Ins. Co. of Penn., 10 *Bosw.*, 82.
4. An exception during the progress of a trial is unavailing, unless it be to the decision of some definite question of law properly brought to the notice of the court. It is not enough, that a point presented in a distinct form for the first time in an appellate tribunal, can be shown to be within the scope of vague and general objections taken on the trial. To make the exception available, it must appear that the precise question intended to be raised was brought to the attention of the court, unless it be of a nature so obvious as to require no specification. *Ct. of Appeals*, 1865, Walsh *a.* Washington Ins. Co., 32 *N. Y.*, 428.
5. An erroneous assumption by the judge, in charging the jury that there is no controversy upon a particular matter of fact, is to be corrected, not by exception, but by calling his attention to it that he may then correct it. *N. Y. Superior Ct.*, 1863, Hoffman *a.* Ætna Fire Ins. Co., *Ante*, 325; affirmed, 32 *N. Y.*, 405.
6. The judges who hold a Court of Oyer and Terminer are not authorized to settle a bill of exceptions, upon application to them individually, after their final adjournment of the court. The exceptions must be settled by the court that tries the indictment; and this should be before it adjourns, for the reason that the Court of Oyer and Terminer is not a continuing court, and that all its powers as a court terminate with the adjournment.* [18 How Pr., 350.] Birge *a.* People, 5 *Park. Cr.*, 9.
7. The proper practice, where a bill of exceptions is settled and signed in this irregular way, is to set aside the bill as improvidently signed. [3 Cow., 32.] *Ib.*
8. An exception to a part of the charge of a judge, presents for con-

* As to this view of the nature of the court, compare 20 *N. Y.*, 581, 5 *Park. Cr.*, 16.

sideration only the legal proposition which the part excepted to affirms *N. Y. Superior Ct.*, 1863, Varnum *a.* Taylor, 10 *Bosw.*, 148.

9. Where the part excepted to consists of a statement of the position taken by the counsel of one of the parties, and states evidence which it affirms was given, a general exception to it will not, on an appeal from the judgment, enable the excepting party to insist that in truth no such evidence was given; especially when the case does not state that it was not given, and the only ground for insisting that it was not given, is the fact that it is not contained in the case and exceptions. *Ib.*

10. If the excepting party desired to call the attention of the judge to the fact that he was mistaken as to such evidence having been given, he should have done so directly, and in a way to inform the judge thereof, and have requested him to admonish the jury that in fact no such evidence had been given; and if the judge had, from misapprehension, refused to correct the error, the party prejudiced thereby would be entitled to relief, on his motion for a new trial on a case. *Ib.*

11. Where a cause is submitted to the court at general term, upon printed points, pursuant to rule 43 of court, which requires the appellant to furnish to the court, with the papers, a printed copy of the points on which he intends to rely, an omission to allude, in such points, to an exception which had been taken on the trial, is a waiver of such exception. (Per BOSWORTH, Ch. J.) *N. Y. Superior Ct.*, Mayor, &c., of N. Y. *a.* Hamilton Fire Ins. Co., 10 *Bosw.*, 537.

CASE.

EXECUTION.

1. The provisions of 2 Rev. Stat., 87, §§ 27, 28—which prescribe the order of preference and payment of debts of a decedent; and those of 2 Ib., 116, § 20—which authorize the surrogate to allow a judgment creditor to issue execution, provided there are assets applicable to his demand; are to be read and construed together,—the former as a direction to executors and administrators as to the performance of their duty, and the latter as a remedy for a creditor in case of neglect; and the surrogate has power, in a proceeding under the latter provisions, to allow execution to issue where there are assets, unless it is made to appear that there are debts of the decedent entitled, under the former provisions, to preference over the demand of the creditor applying. The existence of such debts is not to be presumed. *Ct. of Appeals*, 1865, Mitchell *a.* Mount, *Ante*, 1.

2. The provisions last above referred to—which direct that upon an application for leave to issue execution the surrogate shall require the

executor or administrator to appear and account—do not contemplate a settled or liquidated account; but only require such an accounting of the condition of the assets as will enable the surrogate to determine whether there is any property applicable to the debt in question. (DENIO, Ch. J., dissented.) *Ib.*

3. Under the provisions of 2 Rev. Stat., 116—which authorize the surrogate, upon application of a judgment creditor of an executor or administrator, to require an accounting and allow execution to be issued, —it is erroneous to proceed by an order to show cause without the issue of a citation. *Supreme Ct.*, 1865, St. John *a.* Voorhies, *Ante*, 63.
4. But the defect of omitting such citation is waived by the executor or administrator appearing and proceeding without objection. *Ib.*
5. If on the accounting there appear to be no assets in the hands of the executor or administrator, the surrogate cannot grant leave to issue execution. An order granting leave cannot be sustained on the ground that the executor or administrator had paid other claims of inferior right, or had neglected to reduce to possession certain assets to which he ought to have resorted. (INGRAHAM, P. J., dissented.) *Ib.*
6. It is erroneous for the surrogate to grant leave to issue execution, unless the administrator apply for a sale of the real estate, especially if it does not appear that the time to make such application has elapsed. (Per CLERKE, J.) *Ib.*
7. In a creditor's suit brought by the plaintiff on behalf of himself and others who may come in, the plaintiff cannot, after judgment and the appointment of a receiver to collect the debtor's assets and apply them to payment of the various creditors, issue execution on the judgment. The receiver alone can enforce the judgment. *Supreme Ct.*, 1865, Rigney *a.* Tallmadge, *Ante*, 16.
8. The interest of a special partner in a limited partnership under the statute cannot be levied on and sold under execution, even on a judgment in a suit in which such interest has been levied on under an attachment issued as a provisional remedy. *Ct. of Appeals*, 1863, Harris *a.* Murray, 28 *N. Y.*, 574.
9. The purchaser is bound to know that such sale is illegal, and hence it is not necessary for the special partner, though present, to give any notice, especially if the purchaser is himself a partner in the firm. *Ib.*
10. A mortgagor of chattels, remaining in possession, before default, under a clause in the mortgage entitling him to do so, has an interest in the property, which is the subject of levy and sale on execution against him, or to seizure by a receiver appointed in proceedings supplementary to execution; and although the interest which passes to the purchaser at such sale is only such an interest as the mortgagor had, yet

the sheriff, and the parties promoting the sale, are not trespassers, if the sale is in general terms, without any notice being taken of the existence of the mortgage. *Ct. of Appeals*, 1864, Manning *a.* Monaghan, 28 *N. Y.*, 585; reversing S. C., 10 *Bosw.*, 231.

11. Where judgment debtors, on whose goods execution has been levied, have sold a part of the goods which have been levied upon, and other goods of the same general description have been purchased and put in the place of the former, such substituted goods are liable on the execution, if the judgment debtors neglect, on request, to designate the goods on which the levy was made, and no inventory was taken by the sheriff. Under such circumstances, the sheriff is justified in taking the whole. The substituted goods become liable, in such a case, because the judgment debtors have voluntarily mingled goods not liable to be sold with those that were. *Ct. of Appeals*, 1864, Roth *a.* Wells, 29 *N. Y.*, 471.

12. Notwithstanding the statutes regulating the levy of executions, the common-law right of the sheriff to sell the goods of the judgment debtor within his bailiwick at the time of the receipt of the execution by him, without any actual levy, remains perfect as against the judgment debtor, when no title of a *bona-fide* purchaser intervened or is set up. *Ct. of Appeals*, 1864, Bond *a.* Willet, 29 *How. Pr.*, 47.

13. To constitute a valid levy, it is not necessary that the sheriff should make an inventory of the property, nor that he take actual possession of the goods, or remove them from the custody of the debtor. [19 Wend., 495; 2 Hill, 266.] The test of a valid levy is whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution. *Ct. of Appeals*, 1864, Roth *a.* Wells, 29 *N. Y.*, 471.

14. Where a sheriff went to the store of judgment debtors, saw the goods, asserted his right to them by virtue of his levy, in the hearing of one of the debtors, and subsequently, on the same day, caused the fact that a levy had been made to be indorsed on the execution, by a deputy,—*Held*, this was a valid levy. *Ct. of Appeals*, 1864, Roth *a.* Wells, 29 *N. Y.*, 471. To similar effect, Bond *a.* Willet, 29 *How. Pr.*, 47.

15. It is not an abandonment of a levy, where the sheriff is stayed in his proceedings on the execution and the levy made thereunder, by an order of the court, if he resumes his control and dominion over the property levied upon as soon as the order is vacated. *Ct. of Appeals*, 1864, Bond *a.* Willet, 29 *How. Pr.*, 47.

16. The rule that a mere irregularity will not render a sale upon execution invalid, provided the execution is valid, does not apply where a sale has been made of something of such nature that the sheriff had

no authority to sell it on execution. In such cases, the attempt to obtain possession of the thing sold may be resisted by showing that the sheriff had no authority to make the sale. The one is a want of jurisdiction; the other is a mere irregularity. *Ct. of Appeals*, 1864, Harris *a.* Murray, 28 *N. Y.*, 574.

17. A defendant succeeding, and recovering judgment for costs, in an action to recover the possession of specific personal property, in which no order for his arrest has been made, cannot issue execution against the person of the plaintiff upon such judgment. *N. Y. Superior Ct.*, 1863, Purchase *a.* Bellows, *Ante*, 306.

18. That an execution against the person cannot issue in an action on contract not sounding in tort, unless an order of arrest was made in the action. *Supreme Ct., Sp. T.*, 1863, McKay *a.* Draper, *Ante*, 306, *note.*

19. An execution against the person of the defendant may be issued in an action, the gravamen of which is wilful injury to the plaintiff's property, although the complaint demands an adjudication upon the construction of the will under which the plaintiff claims, where it does not appear that any doubt exists as to the construction, nor that the defendant acted under a claim of right. *Supreme Ct.*, 1864, Niver *a.* Niver, *Ante*, 14.

EXECUTORS AND ADMINISTRATORS.

1. Equitable lien for purchase-money, not a mortgage within the statute charging mortgages of lands descended or devised, upon the heir or devisee. Wright *a.* Holbrook, 32 *N. Y.*, 587; affirming S. C., 18 *Ante*, 202.

2. A judgment not perfected until after the death of the debtor is not entitled to preference of payment under the statute. *Ct. of Appeals*, 1865, Mitchell *a.* Mount, *Ante*, 1.

COMPLAINT, 9; PARTIES, 5, 7.

FORECLOSURE.

A purchaser of land from the State, having a certificate and possession, but no patent, mortgaged the land, and the mortgagee purchased at the sale, and brought an action against an assignee of the original purchaser's certificate, to compel a conveyance of the land.

Held, 1. That the plaintiff acquired only an equitable lien by the foreclosure.

2. That the original purchaser was not a necessary party to the action. *Supreme Ct., Sp. T.*, 1864, Stewart *a.* Hutchinson, 29 *How. Pr.*, 181.

FORMER ADJUDICATION.

1. If he who can and who ought to have explained himself clearly and plainly has not done it when the occasion required and opportunity was presented to him, he cannot be allowed to introduce subsequent restrictions which he has not at the proper time expressed. *Ct. of Appeals*, 1865, Mitchell *a.* Mount, *Ante*, 1.
2. In an action to recover for the use of plaintiff's property by the defendant, a judgment in a former action, which the same plaintiff brought to recover the price as upon a sale, and in which it was adjudged that there was no sale, is admissible. *Ct. of Appeals*, 1863, Rider *a.* Union India Rubber Co., 28 *N. Y.*, 379.
3. A judgment for damages in an action for obstructing the flow of water over a lot of land,—*Held*, no estoppel on the defendant in a subsequent action to establish a right to have a stream run as it had from time immemorial. Goodale *a.* Tuttle, 29 *N. Y.*, 459.
4. Although a judgment or order of a court of record of general jurisdiction, dismissing the complaint in an action at the close of a trial upon the merits, is a bar to a subsequent action for the same cause, yet a judgment or order that a nonsuit be granted and the action discontinued, is not a bar; and where the court, after making an order of dismissal, have, upon summary application, amended it so as to order a nonsuit and discontinuance, the amended judgment is the only evidence which can be received in the second action as to the disposition of the first action, and as amended it is not a bar to the second action. The court will not regard it as void, though it appear that the amendment was erroneous or the proceedings to obtain it irregular. *Ct. of Appeals*, 1863, Audubon *a.* Excelsior Ins. Co., 27 *N. Y.*, 216.
5. The judgment of a court of competent jurisdistion upon a point litigated between the parties is conclusive in all subsequent controversies when the same matter comes directly in question. [3 Comst., 522, and cases there cited; 4 Ib., 71; 2 Seld., 137.] There is no difference in the application of this rule whether the first adjudication be in a formal action or in a proceeding summary in its character. [2 Denio, 33.] *Ct. of Appeals*, 1865, Demarest *a.* Darg., 32 *N. Y.*, 281; S. C. less fully, 29 *How. Pr.*, 281; affirming S. C., 9 *Abbotts' Pr.*, 9.
6. This rule applied to the confirmation of a referee's report in a peculiar case. *Ib.*

7. The denial of a motion to set off judgments is not a bar to an action to compel such set-off. *N. Y. Superior Ct.*, 1864, Pignolet *a.* Geer, *Ante*, 264.
8. The plea of *autrefois convict*, or a former conviction for the same identical crime, though no legal judgment ever was given, or will be, is a good bar to an indictment. [4 Black. Com., 336.] *Supreme Ct.*, 1862, Kuckler *a.* People, 5 *Park. Cr.*, 212.
9. A conviction for larceny before a court which has not jurisdiction to convict for burglary is no defence to a subsequent indictment for burglary with intent to commit the same larceny. The crimes are not the same, and the prisoner could not have been convicted of the latter crime upon the former trial. *Supreme Ct.*, 1860, People *a.* McCloskey, 5 *Park Cr.*, 57.
10. Acquittal on indictment for having certain bank-notes with intent to utter, a bar to a second indictment concerning other bank-notes on the same occasion. People *a.* Van Keuren, 5 *Park. Cr.*, 66.
11. Where a conviction for murder has been reversed for errors, the prisoner may be tried again. *Supreme Ct., Sp. T.*, 1860, People *a.* Rulloff, 5 *Park. Cr.*, 77.
12. A plea of *autrefois convict* cannot be established without proof that the offence was the identical offence charged in the former indictment. *Supreme Ct.*, 1860, People *a.* Cramer, 5 *Park. Cr.*, 171.

FORMS.

1. Form of a certiorari to a Court of Special Sessions, and of a return thereto, and, also, of the complaint taken before the magistrate, and of the recognizance taken to appear before the Court of Special Sessions. People *a.* Riley, 5 *Park. Cr.*, 401.
2. Form of an indictment for nuisance, in erecting and maintaining a dam. Munson *a.* People, 5 *Park. Cr.*, 16.
3. Form of an indictment for nuisance, in permitting a plankroad to be out of repair, with counts under the statute, and at common law. People *a.* Branchport & Penn Yan Plankroad Co., 5 *Park. Cr.*, 604.
4. Form of an indictment for malicious mischief, and of an entry in the record quashing the same. People *a.* Moody, 5 *Park. Cr.*, 568.
5. Form of an indictment for feloniously removing dead body. People *a.* Graves, 5 *Park. Cr.*, 134.
6. Form of an indictment for obtaining money by false pretences. People *a.* Smith, 5 *Park. Cr.*, 490.

7. Form of indictment for obtaining a signature by false pretences. People *a.* Sully, 5 *Park. Cr.*, 142.
8. Form of an indictment for selling spirituous liquors in quantities less than five gallons, without license; of a plea thereto of *autrefois convict;* and of a replication to the plea. People *a.* Cramer, 5 *Park. Cr.*, 171.
9. Form of an indictment for an attempt to commit arson in the third degree. McDermott *a.* People, 5 *Park. Cr.*, 102.
10. Form of an indictment for seduction under a promise of marriage. People *a.* Kenyon, 5 *Park. Cr.*, 254.
11. Form of an indictment for manslaughter in the second degree, in procuring an abortion, under the Laws of 1846, ch. 22, § 1. Cobel *a.* People, 5 *Park. Cr.*, 348.
12. Form of a plea of *autrefois acquit.* People *a.* Van Keuren, 5 *Park. Cr.*, 66.
13. Form of a plea to an indictment, of the Statute of Limitations. People *a.* Roe, 5 *Park. Cr.*, 231.
14. Form of proceedings to remove a decision by the city judge, on *habeas corpus*, into the Supreme Court for review, on a certiorari sued out in behalf of the people. Lowenberg *a.* People, 5 *Park. Cr.*, 473.
15. Form of a return to a writ of error by the Court of General Sessions of New York, containing writ of error, allowance of writ, with stay of proceedings, indictment in a case of murder, necessary entries on the record, statement from minutes of the court, etc., etc. Lowenberg *a.* People, 5 *Park. Cr.*, 414.
16. Form of a warrant of commitment on a refusal to give sureties to keep the peace. Gano *a.* Hall, 5 *Park. Cr.*, 651.

FRAUD.

1. A transfer by a partnership, of the partnership property, to a corporation formed by the partners for the purpose, in payment for which the partners take the stock of the corporation in their individual names, is not *per se* fraudulent as to the creditors of the partnership. *N. Y. Superior Ct.*, 1863, Perse & Brooks Paper-works *a.* Willett, *Ante*, 416.
2. The drawing of checks without funds to meet them is, when unexplained, a badge of fraud, and coupled with the simultaneous transfer of a large sum to a friend, in a clandestine manner, is conclusive, and leaves the sum so transferred liable to the attachments of creditors. *Supreme Ct., Sp. T.*, 1865, Greenleaf *a.* Mumford, *Ante*, 469.
3. When a party has been defrauded, and, with full knowledge of the

fraud, settles the matter in relation to which the fraud has been committed, he has no claim to relief at law or in equity on account of such fraud. [9 Paige, 591.] *Ct. of Appeals*, 1863, Adams *a.* Sage, 28 *N. Y.*, 103.

GOVERNOR.

OFFICER, 4, 5.

GUARDIAN AD LITEM.

1. The appointment of a *guardian ad litem* for an infant defendant who has not been served with summons, is void. *Supreme Ct., At Chambers*, 1862, Glover *a.* Hawa, *Ante*, 161, *note*.
2. After an answer is served, a defendant is too late to move to set aside the plaintiff's proceedings, on the ground that the action is prosecuted without the appointment of a guardian. *Supreme Ct.*, 1865, Parks *a.* Parks, *Ante*, 161.
3. The provisions of the Revised Statutes requiring the next friend of an infant plaintiff to give security for costs, do not apply to a *guardian ad litem* for an infant plaintiff, appointed under the provisions of the Code of Procedure. *Supreme Ct.*, 1863, Grantman *a.* Theall, *Ante*, 308.

HABEAS CORPUS.

1. The writ of *habeas corpus*, issued to inquire into the cause of an imprisonment, is in the nature of a writ of error; and when allowed and heard by an officer out of court (under the Revised Statutes), the officer is deemed a court within the meaning of the act of 1864, which forbids certain prisoners to be discharged before the expiration of sentence, except upon review by a court of superior jurisdiction to the magistrate making the commitment. *N. Y. Com. Pl., At Chambers*, 1865, Case of the Twelve Commitments, *Ante*, 394.
2. The question of a prisoner's guilt or innocence of a crime for which he is indicted, cannot be decided on an application for a discharge on *habeas corpus*. The history of the writ, the nature of it, and the practice under it, both as a common-law remedy, and as extended and modified by statute in England and in this country, show that it never was contemplated that such a trial was to be had. The only way in which this question can be tried, is by the intervention of a jury, before a proper court. [1 Hill, 377; 3 Ib., 658.] *Supreme Ct., Sp. T.*, 1860, People *a.* Rulloff, 5 *Park. Cr.*, 77.

3. An application by a prisoner, indicted and imprisoned for an offence not triable in a Court of Sessions, to be discharged, on the ground that he has not been brought to trial within the time prescribed by part 4, chapter 3, title 5, section 31 of the Revised Statutes, may be made to any court having jurisdiction to issue a writ of *habeas corpus*. The right to discharge in such a case is not limited to the Court of Oyer and Terminer. *Supreme Ct., I. Dist.*, 1861, People *a.* Jefferds 5 *Park. Cr.*, 518; see 5 *infra*, to the contrary.
4. Where such an application was made to the Supreme Court at special term, in a case where the prisoner was indicted for murder, and it was shown by the public prosecutor that a special term of Oyer and Terminer had been ordered by the governor, to be held in the county within a few days thereafter, before which it was his intention to try the prisoner,—*Held*, that the cause assigned was a satisfactory one, under 2 Rev. Stat., 737, § 32; and the prisoner should be detained in custody until after the sitting of the Oyer and Terminer, with leave to renew the application at that time, if, in the mean time, the indictment should not be brought to trial. *Supreme Ct.*, 1861, People *a.* Jefferds, 5 *Park. Cr.*, 518.
5. An order continuing an indictment to another term, made in the absence of the prisoner, is irregular merely, and not ground of discharge on *habeas corpus*. *Supreme Ct., Sp. T.*, 1860, People *a.* Rulloff, 5 *Park. Cr.*, 77; see 3 *supra*, to the contrary.
6. Upon a return by a *habeas corpus* in the case of arrest upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded. [2 Just., 52.] *Supreme Ct., At Chambers*, 1865, Matter of Henry, 29 *How. Pr.*, 185.

COMMITMENT, 8, 9, 12.

HIGHWAYS.

1. Upon an application to lay out a highway from one point to another, an order of the commissioners laying out one of the legal width, for a part of the distance, and continuing for the rest of the distance with a width of only two rods, is valid, if the latter part is in fact an old highway used for twenty years, such as the statute authorizes to be described and recorded with a width of only two rods. It is not necessary that the commissioners should adjudge it to be an old highway. *Ct. of Appeals*, 1863, Snyder *a.* Plass, 28 *N. Y.*, 465.
2. Powers of the commissioners of highways in surveying and laying out a road. Marble *a.* Whitney, 28 *N. Y.*, 297.

3. Mode of determining width of highway which has not been ascertained and described by the commissioners. Talmage *a.* Huntting, 29 *N. Y.*, 447; affirming S. C., 39 *Barb.*, 654.

INDICTMENT.

1. In criminal pleading it is a proper practice in one count of an indictment to refer to matters in a previous count; and where one count of an indictment is bad, a subsequent count may be sustained by reference to the first count for some allegations. [Wharton Cr. L., 154, and case cited; 1 Chitty Cr. L., 250; 2 H. Black., 131.] *Supreme Ct.*, 1860, People *a.* Graves, 5 *Park. Cr.*, 134.
2. Prosecutor not compelled to elect between several counts. Nelson *a.* People, 5 *Park. Cr.*, 39; affirmed, 23 *N. Y.*, 293.
3. Although the law provides that a grand-jury shall consist of not more than twenty-three persons, an indictment purporting to be found by a grand-jury of twenty-four is not void, but only irregular; and the objection cannot be set up for the first time after conviction and sentence. [2 Barb., 427; 1 Neville & Perry, 187; 6 Adolphus & Ellis, 236; 2 Bennett & Heard's Leading Cr. Cases, 317.] *Ct. of Appeals*, 1860, Conkey *a.* People, 5 *Park. Cr.*, 31.
4. An indictment should not be quashed on the ground that it was found and presented by the grand-jury, pending an examination of the same charge before a police magistrate. [2 *Park. Cr.*, 566.] It is better to have an investigation before a magistrate in the first instance, and not to indict while such examination is pending. But cases may often arise where this rule might, with propriety, be departed from. The grand-jury, acting under the obligation of their oaths, must determine, as cases are presented, whether they will, or will not, act upon them prior to an examination before a magistrate, and while such examination is pending. *N. Y. General Sessions*, 1863, People *a.* Heffernan, 5 *Park. Cr.*, 393.
5. To authorize a conviction under the act passed April 23, 1862, entitled, "An Act to Prevent the Adulteration of Milk, and to Prevent the Traffic in Impure and Unwholesome Milk," it is necessary to aver in the complaint or indictment, and to prove on the trial, that milk was adulterated with the view of offering it for sale or exchange. A charge that the defendant had adulterated milk, without stating the object of such adulteration, is insufficient. *Supreme Ct.*, 1862, People *a.* Fauerback, 5 *Park. Cr.*, 311.
6. Under an indictment for arson in the first degree, a prisoner may be convicted of arson in the third degree, when he is proved to have set

on fire a house, as well as the goods in it, for the purpose of prejudicing the insurer. *Supreme Ct.*, 1861, Freund *a.* People, 5 *Park. Cr.*, 198; distinguishing Dedieu *a.* People, 22 *N. Y.*, 178.

7. The words "not being the subject of arson in the first degree," used in the statute defining arson in the second degree (2 Rev. Stat., 666, § 2), were intended to distinguish between different degrees of the same general offence, with a view to graduate the punishment, and do not create an exception which the pleader is required to negative in charging the offence of arson in the second degree. *Supreme Ct.*, 1862, People *a.* Durkin, 5 *Park. Cr.*, 243.

8. A person charged with an assault and battery upon a person to the jury unknown, can be convicted, although it appears that the person assaulted is known at the time of the trial, if there be no evidence that the grand-jury who found the indictment had any knowledge upon the subject. It is the ignorance of the grand-jury, and not of the petit-jury, which authorizes the statement that the person is unknown. It does not sustain the objection, that the evidence upon the trial discloses the name, unless it at the same time appears that the name was known to the grand-jury. [3 Campb., 264; Russ. & R., 372]. *Ct. of Appeals*, 1865, White *a.* The People, 32 *N. Y.*, 465.

9. Upon an indictment of several persons for assault and battery, some may be convicted of assault and battery, and others of an assault simply. It is true, that all the defendants who are convicted upon one indictment must have been guilty of the same offence, but they may have been guilty in different degrees. Several persons may be guilty of a joint assault, while only a portion of them are guilty in a battery committed on the same occasion upon the same injured party. *Ct. of Appeals*, 1865, White *a.* The People, 32 *N. Y.*, 465.

10. An indictment for a conspiracy, which avers that the accused, with another person, conspired unlawfully and maliciously to procure a third person to be arrested for the offence of larceny, well knowing he was not guilty of said offence, follows the statute substantially, and contains all the needful averments to sustain a conviction. *Ct. of Appeals*, 1863, Elkin *a.* The People, 28 *N. Y.*, 177.

11. On the trial of an indictment for having in possession a counterfeit bank-note, with the intention of passing it, it is no defence that the bank-note is not set forth in the indictment, and that no reason for omitting to set it forth is assigned in the indictment. The omission must be deemed a matter of form, and is cured by the Revised Statutes, which declare that "no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings therein be affected by reason of any defect or imperfection in matters of form, which do not

tend to the prejudice of the defendant." [2 R. S., 728, § 52.] *Supreme Ct.*, 1862, Tomlinson *a.* People, 5 *Park. Cr.*, 313.

12. In an indictment for forgery or counterfeiting, the omission to state, in setting forth the note, matter upon the face of the note which would not be essential to the validity and binding force of such note as against the ostensible maker—*e.g.*, the countersigning by public officers, in the case of a bank-note—is not a material variance. *Supreme Ct.*, 1861, Wilson *a.* People, 5 *Park. Cr.*, 178.

13. In an indictment for forgery, if the counterfeit note, which it is charged the prisoner had in his possession, is set forth in *hæc verba*, it is unnecessary to allege, in addition, that the note purported to be the act of another. *Ib.*

14. Requisites and form of an indictment for the crime against nature. Lambertson *a.* People, 5 *Park. Cr.*, 200.

15. On an indictment for a nuisance, judgment for abatement of it cannot be sustained if there is no allegation in the indictment that the defendant continued the nuisance. Upon an indictment merely for erecting and maintaining, a personal judgment only can be inflicted. [8 Durnf. & E., 142.] *Supreme Ct.*, 1860, Munson *a.* People, 5 *Park. Cr.*, 16.

16. An indictment for nuisance, against a plankroad company, containing an allegation that the defendants' road was, and had been, and, at and until the finding of the indictment, still was out of repair, &c., cannot be sustained without proof, not only that the road had been out of repair, but that it continued so to be down to the time of the finding of the indictment. [1 Russ. Cr., 356.] *Supreme Ct.*, 1864, People *a.* Branchport and Penn Yan Plankroad Co., 5 *Park. Cr.*, 604.

17. In an indictment against a railroad company for an unlawful and wilful neglect to erect and maintain fences on the sides of the road, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences. [3 Chitty Cr. L., 571, 578; Archb. Cr. Pl., 643, 645; 5 Burr., 2700; 2 Saund., 158, n. q.; 2 T. R., 513.] If it is not necessary that the indictment should contain a formal averment of duty or obligation to erect and maintain the fences, it should at least allege the obligation in the form of the statute, by a recital of it, or some reference to it in such a manner as to show the obligation or duty of the defendant. *Supreme Ct.*, 1861, People *a.* N. Y. Central R. R. Co., 5 *Park. Cr.*, 195.

18. To convict of having feloniously received goods which had been stolen from an incorporated company, it is necessary to allege in the indictment, and to prove on the trial, that the company alleged to have been injured by the offence of the defendant was an existing corporation. *Supreme Ct.*, 1862, Cohen *a.* People, 5 *Park. Cr.*, 330.

19. In an indictment for wilfully cutting wood or timber upon lands of another, under 2 Rev. Stat., 693, § 15, as amended by the laws of 1851, ch. 182, it is necessary to describe the lot or close on which the trespass was committed, with reasonable certainty, so that defendant may know the precise charge against him, and prepare his defence thereto. [7 Barb. R., 9; 3 Archb. Cr. Pl., by Waterman, 505–2; 8 Barb. R., 547.] *Oyer and T.*, 1862, People *a.* Carpenger, 5 *Park. Cr.*, 228.

FORMS, 2–11, 15.

INJUNCTION.

1. Where a widow has barred herself by an estoppel *en pais* from setting up a claim to dower, but proceeds, nevertheless, to procure the admeasurement of dower, and threatens to bring ejectment to recover the same, she may be permanently enjoined from doing so, and an action may be maintained against her for such purpose. Such proceedings on her part constitute a cloud upon the title to such land, and justify the commencement of an action to quiet the title to the same. *Ct. of Appeals*, 1865, Wood *a.* Seely, 32 *N. Y.*, 105.
2. The courts will not, by injunction, restrain a party from the violation of a contract in which the parties have fixed and liquidated the damages for such violation. *Supreme Ct., Sp. T.*, 1865, Nessle *a.* Reese, *Ante*, 240.
3. It does not alter the case that the parties defendant are insolvent. *Ib.*
4. In action for waste in cutting timber, it may be questionable whether an injunction is proper as to timber already cut; but the court having acquired jurisdiction, it may require the defendant to give security to account, as a condition of modifying the injunction in this respect. *Supreme Ct., Sp. T.*, 1865, Weatherby *a.* Wood, 29 *How. Pr.*, 404.
5. Where a defendant fully answers, in words, the equities of the complaint, it does not follow, necessarily, that an injunction should be dissolved, particularly where its continuance could be of no pecuniary damage to the defendants, and is necessary to the full satisfaction of the plaintiff's demand. *Supreme Ct., Sp. T.*, 1865, Carpenter *a.* Danforth, *Ante*, 225.
6. An injunction dissolved on the grounds: 1. That the affidavit, and papers upon which it was granted, were not legibly written; 2. That the injunction had not been served personally; 3. That the papers had not been filed [rule 4]. Johnson *a.* Casey, 28 *How. Pr.*, 492.

INTERPLEADER, 2; JUDGE.

INNKEEPERS.

1. Where the keeper of a hotel kept notices posted in his hotel, cautioning guests against leaving money or valuables in their rooms, as the proprietors would not be responsible therefor, and requiring packages of value to be properly labelled, and deposited in the safe in the office; and the plaintiff delivered to their clerk a package containing twenty thousand dollars in money, marked only with his name; and being asked by the clerk what it contained, answered "money," without stating the amount;—*Held*, that the innkeepers were not liable for the embezzlement of it by the clerk, except for such amount as was found by the jury to be necessary for the guest's travelling expenses. The guest was guilty of negligence in not distinctly describing or labelling the package with the statement of the value. *N. Y. Superior Ct.*, 1865, Wilkins *a.* Earle, *Ante*, 189.
2. The notice given by a guest should be not only of the kind of property, but of its value. *Ib.*

INSOLVENCY.

1. In proceedings by an insolvent to obtain a discharge from his debts under the two-thirds act, the omission, by judgment creditors uniting in the petition, to add to their signatures, at the time of signing, a relinquishment of their judgments to the assignee, is an irregularity, and does not deprive the judge, to whom the petition is presented, of jurisdiction. *Supreme Ct.*, 1865, Philip's Case, *Ante*, 281.
2. The defect may be cured by subsequent amendment, before further proceedings in the case. *Ib.*
3. If the affidavit annexed to the petition of an insolvent, in proceedings under the two-thirds act, is not sworn to by him before the judge, nor subscribed by the judge, prior to granting the order for the creditors to appear and show cause, there is a fatal defect in the proceedings, which will render the assignment and discharge void for want of jurisdiction in the officer, and a subsequent verification of the petition will not cure the defect. *Ct. of Appeals*, 1863, Ely *a.* Cooke, 28 *N. Y.*, 365.
4. An insolvent's discharge, which stated "that the said insolvent has conformed in all things to those matters required of him by the statute,"—*Held*, sufficient in form, without setting forth that the due proof was furnished of the notice having been given, personally, or by

mail, twenty or forty days before the day of showing cause, etc. *Supreme Ct.*, 1865, Pratt *a.* Chase, *Ante*, 150.

AFFIDAVIT.

INSURANCE.

1. A policy of insurance issued to partners, which contains a clause declaring it void in case of a sale of the property insured without the consent of the insurers, is not annulled by a sale or release, by one partner, of all his interest to the others. (BARBOUR, J., dissented.) *N. Y. Superior Ct.*, 1863, Hoffman *a.* Ætna Fire Ins. Co., *Ante*, 325; affirmed, 32 *N. Y.*, 405.
2. The cases of Tillou *a.* Kingston Mut. Ins. Co., (7 Barb., 70), and Wilson *a.* Genesee Mut. Ins. Co. (16 Ib., 511), as to this point, approved. *Ib.*
3. Where a policy declares that the value of the property shall be deemed what it may cost at the time of the fire to replace it, and also requires the preliminary proofs to state the actual cost of the articles, the insured are not bound by their statement of the actual cost from claiming that the value was a greater sum. *Ib.*
4. If the goods were those which the insured dealt in at wholesale, or manufactured, the price for which similar goods were generally sold by wholesale dealers or manufacturers may be considered by the jury in estimating such value. *Ib.*
5. The failure of the insured to specify any of the goods with particularity, in their proofs of loss, if caused by their inability to do so in consequence of the total destruction thereof, does not preclude them from recovering for such goods. *Ib.*
6. The usual clause in a policy, that upon the happening of a fire the insured shall use all reasonable means for the protection of the property, etc., does not bind them to use any means to restore it to its previous condition, but only to take the necessary steps to prevent its deterioration, and place it in a condition to be examined. *Ib.*
7. Thus, where a large part of the goods were shirts, bosoms, and collars, most of which were injured only by water or by handling,—*Held*, that the insured were not bound to have them relaundried. *Ib.*
8. Where the printed condition of a policy excepted losses "caused by, or consequent upon, the bursting or collapsing of a steam-boiler or steam-pump," but the written portion insured the steam-engine; and the fire, by which the insured property was destroyed, was caused by an explosion of the steam-boiler;—*Held*, that there was a repugnancy

between the written and printed portions of the policy, and that the written portions must prevail. *Supreme Ct.*, 1864, Hayward *a.* N. W. Ins. Co., 19 *Abbotts' Pr.*, 116.

9. The case of Hayward *a.* Liverpool, etc., Ins. Co. [7 Bosw., 385], opposed. *Ib.*

10. Where a policy of life insurance provides that it may be continued from year to year, if the premiums be paid on or before specified days, such payment is a condition precedent to the continuing of the policy. *N. Y. Superior Ct.*, 1865, Howell *a.* Knickerbocker Life Ins. Co., *Ante*, 217.

11. The fact that on a day on which a premium became due the insured received his death-stroke by a disease from which he died on the day following, does not alter the case. The insurers are not liable in such case, unless a tender of the premium on the day on which it became due, or at least before the death of the insured, is proved.

INTERPLEADER.

1. An action to compel defendants to interplead cannot be sustained where the plaintiff claims a portion of the fund in dispute. *N. Y. Com. Pl.*, Wakeman *a.* Dickey, 19 *Abbotts' Pr.*, 24.

2. In such a case, an injunction restraining the defendants from their actions against the plaintiff cannot be sustained. *Ib.*

JUDICIAL SALE.

1. Surprise and gross inadequacy of price are sufficient grounds for setting aside a judicial sale of real estate, upon fully indemnifying the purchaser. *N. Y. Superior Ct.*, 1862, Griffith *a.* Hadley, 10 *Bosw.*, 587.

2. The sale of several distinct and separate parcels of land, greatly exceeding the debt to be collected, in one mass, to the prejudice of the debtor, is a sufficient ground for setting aside a sale of real estate, even without indemnity to the purchaser. *Ib.*

EXECUTION.

JUDGE.

An injunction is dissolved on account of the affinity of the judge who granted the injunction, to one of the defendants in the cause. *Supreme Ct., Sp. T.*, 1855, N. Y. & New Haven R. R. Co. *a.* Schuyler, 28 *How. Pr.*, 187.

JUDGMENT.

1. Under the Code of Procedure, it is competent for the clerk to enter judgment with blanks for the costs, and to insert them afterwards when they have been taxed. The adjustment of the costs, and inserting the same in the record, is but a means of completing the judgment [1 Abbotts Pr., 120; 1 Code R. N. S., 119], and is not amending or impairing the record, within the meaning of 3 Rev. Stat., 5th ed., 723, which prohibits the alteration of records. *Supreme Ct.*, 1865, Cotes *a.* Smith, 29 *How. Pr.*, 326.
2. Where a cause is tried upon issue of fact by the court, without a jury, the judgment entered upon the decision must not contain any provisions not embraced in the decision. *N. Y. Superior Ct.*, 1865, Loeschigk *a.* Addison, *Ante*, 169.
3. The conclusion of law found by the court must contain all that goes into the judgment. *Ib.*
4. In an action to have cancelled a mortgage alleged to be paid, and asking an account, and for judgment for any balance due, if after full litigation it is proved that a certain sum remains due and unpaid on the mortgage, the court may give judgment that the mortgage shall be cancelled upon plaintiff's paying such sum, and if he fail so to redeem, that his action be dismissed. Such dismissal operates as a foreclosure of the mortgage. [Hoffm., 353; Story's Eq. J., §§ 693, 707; 11 Ves., 199.] *Ct. of Appeals*, 1863, Beach *a.* Cooke, 28 *N. Y.*, 508; affirming S. C., 39 *Barb.*, 360.
5. Where vendors of real property sued the purchaser for breach of his contract to take the title, claiming to recover, not the amount of the purchase-money, but merely their damages by reason of his alleged failure to perform, and upon the trial before a justice of the court, a jury being waived, the plaintiffs failed to make out a right to recover any damages;—*Held*, that the court could not grant a judgment for specific performance in their favor, although upon the evidence they might have maintained an action for such relief. (ROBERTSON, J., dissented.) *N. Y. Superior Ct.*, 1863, Towle *a.* Jones, *Ante*, 449.
6. A special allowance to a guardian in the action, ordered to be paid out of the fund in suit, even if irregularly made, is not to be struck out on motion of a party having no interest in the fund. *Superior Ct.*, 1865, Cotes *a.* Smith, 29 *How. Pr.*, 326.
7. Where the plaintiffs prosecuted their suit against one whom they knew was not the real party in interest, and who assumed the whole defence of the action, incurred all the expenses of the litigation, and

recovered a judgment for costs in the name of the nominal defendant, against the plaintiff;—*Held*, that payment by the plaintiffs to the nominal defendant was in their own wrong, and a fraud on the actual defendant; and satisfaction so obtained should be vacated by the court on motion. *Ct. of Appeals*, 1863, McGregor *a.* Comstock, 28 *N. Y.*, 237.

8. In an action upon a judgment of a court of record, the defendant may show that he had not been served with process and had never appeared in the action in which the judgment was recovered. *N. Y. Com. Pl.*, 1865, Porter *a.* Bronson, *Ante*, 236.
9. The recitals of these facts in the judgment are presumptive, but not conclusive, evidence of the jurisdiction. *Ib.*

CONFESSION OF JUDGMENT; CREDITORS' ACTION, 6; FORECLOSURE; MANDAMUS.

JURISDICTION.

1. Of the meaning of the term "jurisdiction." Lewis *a.* City of Buffalo, 29 *How. Pr.*, 335.
2. If officers have done what the statute authorizes them to do, the presumption will be that they intended to do it in accordance with the statute. But even if it should appear that they intended something contrary to the statute, and yet that the act done was in accordance with it, the unlawful or the mistaken intention would not divest the proceeding of jurisdiction. Jurisdiction does not depend upon the intention of the officer, or tribunal, undertaking to act, in a given case. The question is, does the law authorize the act? *Ct. of Appeals*, 1864, Sinder *a.* Plass, 28 *N. Y.*, 465.
3. The power to hear and decide proceedings for the summary dispossession of tenants, is a judicial power. *Supreme Ct.*, 1865, People *a.* Russell, *Ante*, 136.
4. Since the constitution of 1846 and the Code have vested equity powers in the Supreme Court, and the law and equity are administered by the same tribunal, there is, or should be, no further turning a party out of court, and to some other forum, who shows a good cause of action. Relief is now given according to the right of action. [20 N. Y., 62.] *Supreme Ct., Sp. T.*, 1865, Weatherby *a.* Wood, 29 *How. Pr.*, 404.

APPEARANCE; INSOLVENCY, 1–3.

JUSTICES' COURTS.

I. *Jurisdiction.*

1. If a justice fails to render his decision within the time limited by law, he loses jurisdiction of the case; and the plaintiff's only remedy is to sue again. [1 Hilt., 301; 19 Wend., 371; 4 E. D. Smith, 279.] *N. Y. Com. Pl.*, 1865, Bloomer *a.* Merrill, 29 *How. Pr.*, 259.

II. *Process, and Return.*

2. A statement in an affidavit that the defendant is justly indebted to the plaintiff on a demand arising upon keeping his horses,—*Held*, to be a sufficient statement that the demand is one "arising upon contract, express or implied," within the meaning of the statute [2 Rev. Stat., 263; 3d ed., 462, § 216], to sustain an attachment. It is sufficient that the affidavit tends to establish such a demand. *Supreme Ct.*, 1865, Williams *a.* Barnaman, *Ante*, 69.
3. Under the Non-imprisonment Act, a bond by the plaintiff with one surety is sufficient to warrant the issuing of an attachment. *Ib.*
4. Where the body of the attachment-bond wholly omitted the name of the surety, but the bond was plainly subscribed by him for the purpose of becoming surety, and the justice approved of him as "the security in the bond,"—*Held*, a sufficient signing by the surety to render the bond valid. *Ib.*
5. Where the constable fails to state in his written return the date of the service of the attachment, and to date his return, these data may be supplied from other facts in the proceedings. *Ib.*
6. Where a constable fails to state in his written return that he left a copy of the inventory and attachment with the person *in whose possession* the property attached was at the time of the service of the attachment, the omission is fatal to any judgment upon such attachment, whether it is questioned on appeal or collaterally, and no other evidence of that fact can be admitted to sustain such judgment. *Ib.*
7. A statement that a copy of the inventory and attachment were "left with B.'s wife, as B. cannot be found in this county," is a sufficient statement that B. was not personally served. *Ib.*

III. *Appeal.*

8. On an appeal to the County Court from a judgment of a justice in summary proceedings for possession of land, the approval of the security was first signed by the justice, and afterwards his signature was cancelled, and the approval was signed by the county judge;—*Held*,

that under the act of 1863, if this were an irregularity, it was not ground for dismissing the appeal. *Superior Ct.*, 1865, Hammond *a.* Carpenter, 29 *How. Pr.*, 48.

9 Where an appeal is taken from a justice's judgment for the sole purpose of reversing it, the notice of appeal need not state in what particular the judgment should have been more favorable to the appellant, for if his whole ground of complaint is that the judgment is erroneous, and should be reversed, his case falls under sections 353 and 368 of the Code. But if he claims that the judgment for any reason should be made more favorable to him—*e. g.* that the amount should be reduced—he must point out in his notice of appeal in what particular. This should be plain, clear, and specific, so that the respondent may know precisely and exactly what is meant or demanded. *Supreme Ct.*, 1865, Wallace *a.* Patterson, 29 *How. Pr.*, 170. But compare *Laws of* 1865, 1289, cited 18 *Ante*, 561.

10. A statement in a notice of appeal from a judgment of a justice's court, "that the judgment should have been in favor of the defendant, and against the plaintiff, for costs," is not sufficient to entitle the appellant to costs in case of his recovering a more favorable judgment in the County Court. But a statement, "that the judgment should have been for a less amount of damages against the defendant," is sufficient. *Supreme Ct.*, 1865, Loomis *a.* Higbie, 29 *How. Pr.*, 232. But compare *Laws of* 1865, 1289, 1290, cited in 18 *Ante*, 561.

11. A defendant in proceedings in a justice's court, who does not appear before the justice on the return-day of the summons, is precluded from objecting, on appeal, to the regularity of the proceedings. *Supreme Ct.*, 1865, People *a.* Powers, *Ante*, 99.

12. In reviewing proceedings before justices of the peace, it is the province of the court to give them, and all the acts of the parties upon trial, a fair and reasonable construction, such as it may be supposed was intended by the parties, or understood by the court, and so as to save, and not destroy, the rights of the parties. The same precision is not to be looked for either in offers of, or objection to, evidence, nor the same care in noting them, that may be expected upon trials in a court of record or on a formal bill of exceptions. *Ct. of Appeals*, 1862, Wilson *a.* Elwood, 28 *N. Y.*, 117.

13. Exceptions taken, upon the trial, in a County Court, of a cause brought to that court by appeal from a justice's court, may be reviewed in the Supreme Court on appeal thereto from the judgment of the County Court, although a motion for a new trial has not been made in the County Court. *Supreme Ct.*, 1865, Broughton *a.* Mitchell, *Ante*, 163.

14. A ruling of the County Court that is excepted to, is a decision of that court, and it need not be passed upon a second time in that court to authorize the Supreme Court to review it. *Ib.*
15. The rulings of a referee on the trial of a cause in the County Court are deemed decisions of such court for this purpose. *Ib.*
16. The Supreme Court may now review judgments of the County Court brought up by appeal, on exceptions that are made a part of the record, though the exceptions have not been passed upon in the former court by a motion for a new trial in that court; and it may reverse the judgments of such court and grant new trials therein. *Ib.*
17. The case of Carter *a.* Werner (27 *How. Pr.*, 385) disapproved, and that of Monroe *a.* Monroe (*Ib.*, 208) adhered to. *Ib.*

APPEAL, 6, 32; ATTORNEY, 1, 2.

LEGACIES.

1. Under the provisions of the Revised Statutes, interest on general legacies commences to run from the period of one year from the issue of letters testamentary, not in one year from the death of the testator. *N. Y. Surr. Ct.*, 1865, Matter of Fish's Estate, *Ante*, 209.
2. *It seems*, however, if a direction be given in the will for an earlier payment, or a clear inference can be drawn of such an intention on the part of the testator, from the language of the will, then interest commences to run from the time fixed for the payment of the principal; and annuities, or incomes and interest upon sums directed to be invested upon trust to pay over interest or income, commence to run from the death of the testator. *Ib.*

LEASE.

Under a lease providing that the tenant shall not sublet without written consent of the lessor, a person who is in actual occupation as a subtenant of the lessee with oral consent of the lessor, is not a wrongdoer, and may recover against the lessor for damages done to his property by the fall of an unsafe building upon the premises. *Supreme Ct.*, 1864, Benson *a.* Suarez, *Ante*, 61.

LIBEL.

A plaintiff suing for a libel on him in respect to his business, which is one which by law a license is required for, need not aver and prove that

he had a license. If the defendant wishes to avail himself of the defence that the plaintiff had not the requisite qualifications under the statute, he should allege it in his answer. The burden of proving the want of qualification is upon the defendant. [Starkie on Slander, ch. 26, p. 384.] *Ct. of Appeals*, 1863, Fry *a.* Bennett, 28 *N. Y.*, 324.

LIMITATIONS OF ACTIONS.

1. Limitations not a defence to an action to recover the value of the use of plaintiff's property by defendant for six years down to the commencement of the suit, where the commencement of such use, though more than six years previous, was lawful, being with the consent of the plaintiff. *Ct. of Appeals*, 1863, Rider *a.* Union India Rubber Co., 28 *N. Y.*, 379.
2. An action on a policy of insurance which was brought promptly upon the expiration of sixty days from the adjustment of loss,—*Held*, not barred because commenced more than six months after the loss occurred. And—*It seems*, that where objections are made by the insurers to the preliminary proofs of loss, the sixty days are not deemed to commence until after a reasonable time for the insured to examine the objections. Mayor, &c., of N. Y. *a.* Hamilton Fire Ins. Co., 10 *Bosw.*, 537.
3. Under the Revised Statutes as amended in 1860 (*Laws of* 1860, 474, ch. 271), an indictment must be found within three years from the commission of the offence; it is not material that the defendant was in another State during a part of such period. *Oyer & T.*, 1862, People *a.* Roe, 5 *Park. Cr.*, 231.

MANDAMUS.

1. The nature and history of the proceedings by mandamus stated. People *a.* Supervisors of Richmond, 28 *N. Y.*, 112.
2. Mandamus will lie for relief against an unlawful assessment of a personal tax. [Abbotts' Pr., 18.] *Supreme Ct., Sp. T.*, 1865, People *a.* Assessors of the Town of Boston, 29 *How. Pr.*, 171.
3. Where an act of the Legislature has declared a claim against the city valid, and has provided the means and manner of raising the money to pay it, it becomes the duty of the comptroller to settle and adjust it, whether the act directs him to draw his warrant or not; and the insertion of such a direction in the act does not confine the remedy of the creditor to proceeding by mandamus against the comptroller; but

upon his refusal to draw a warrant for the sum, an action lies for the amount against the city. *N. Y. Com. Pl.*, 1865, Stilwell *a.* Mayor, &c., of N. Y., *Ante*, 376.

4. If the supervisors make a false return to a mandamus sued out by an individual whose land is taken for a highway, and the relator has been kept out of the damages to which he was entitled from the town, the supervisors may be properly made liable in damages, to the extent of the interest upon the damages assessed; and may have judgment therefor in the proceedings on the mandamus. The judgment should be, that a peremptory mandamus issue to the Board of Supervisors, commanding them to audit the claim as commanded in the alternative writ. A direction to the jury to render a verdict for the relator for the amount of the damages assessed, and the interest thereon as damages, is erroneous. *Ct. of Appeals*, 1863, People *a.* Supervisors of Richmond, 28 *N. Y.*, 112.

MARINE COURT.

1. The Marine Court is not a court of record for all purposes; and attorneys-at-law, as such, belong only to courts strictly courts of record, except when otherwise expressly provided by statute. *N. Y. Com. Pl.*, 1865, Porter *a.* Bronson, *Ante*, 236.
2. Whether the act relating to district courts (*Laws of* 1857, ch. 344), makes attorneys-at-law officers of those courts,—*Query?* *Ib.*
3. Any summons, warrant, attachment, execution, or other process issued by any of the justices of the Marine Court in the city of New York, or by the clerk of said court, may be served and executed by any marshal of said city; and the clerk of said court shall, upon the application of the plaintiff or his attorney, in any action or proceeding in said court, direct any such process to the marshal designated by the plaintiff or his attorney, for service or execution; and said marshal shall be entitled to the same fees therefor as the sheriff of the county of New York is allowed by law for like services; and the return of any of said marshals to any process directed to him for service or execution as aforesaid, shall have the same force and effect as the return of a sheriff to process issued out of courts of record. *Laws of* 1865, 738, ch. 400.
4. The Marine Court may, upon consent, refer any issues in an action therein, and may order reference where the trial of an issue of fact shall require the examination of a long account on either side. *Laws of* 1865, 796, ch. 436, § 2.
5. Powers and duties of the referee. Effect of report. *Ib.*
6. The Marine Court may grant allowance to prevailing party in a litigated action, not exceeding $25 additional to costs. *Laws of* 1865, 796, ch. 437, § 5.
7. Expenses of printing, in cases on appeal in the Marine Court, may be taxed, and allowed to the prevailing party. *Ib.*, § 6.

MEASURE OF DAMAGES.

1. In an action by a sheriff, upon an undertaking given to him by a defendant arrested under an order of arrest in a civil action, the measure of damages is *prima facie* the whole amount of the undertaking. *N. Y. Superior Ct.*, 1863, Willett *a.* Lassalle, *Ante*, 272.
2. Measure of damages upon breach of covenant for title when there is no fraud. Mack *a.* Patchin, 29 *How. Pr.*, 20.
3. Measure of damages in an action by a father as administrator of his wife, who was killed by the negligence of the defendants. Tilley *a.* Hudson River R. R. Co., 29 *N. Y.*, 252.

MECHANICS' LIEN.

1. In a proceeding to foreclose a mechanic's lien, a finding that a certain sum is due to the contractor is a finding of fact; and if it were deemed a conclusion of law, the objection that the facts were not found and separately stated is not available on an appeal to the Court of Appeals. *Ct. of Appeals*, 1864, Smith *a.* Coe, 29 *N. Y.*, 666.
2. A mechanic's lien ceases after one year, unless continued by order of the court. *N. Y. Common Pleas*, 1865, Welch *a.* Mayor, &c., of New York, *Ante*, 132.

MISTAKE.

A person who has applied to the highway officers to lay out a road, and consents to their taking his land, cannot treat their acts in so doing as void, upon the ground that he was mistaken as to their powers. *Ct. of Appeals*, 1863, Marble *a.* Whitney, 28 *N. Y.*, 297.

MORTGAGE.

The purchase of a mortgage, on which no default has been made, by a party in the wrongful possession of the mortgaged premises, gives him no right to hold the property as mortgagee in possession. *N. Y. Superior Ct., Sp. T.*, 1865, Madison Ave. Bapt. Ch. *a.* Bapt. Church in Oliver St., *Ante*, 105.

MOTIONS AND ORDERS.

Striking out irregular proceedings may be ordered under the prayer for general relief, in a notice of motion to amend such proceedings. *Supreme Ct., Sp. T.*, 1865, Boylen *a.* McAvoy, 29 *How. Pr.*, 278.

MUNICIPAL CORPORATION.

1. A city corporation may be compelled to pay the expenses incurred by one of its officers, by the employment of his own counsel, in a contest to gain the possession of its property, in the result of which it is interested; and an act of the Legislature allowing the charge as proper, and directing the supervisors to raise it by tax, is conclusive on the city. *N. Y. Com. Pl.*, 1865, Stilwell *a.* Mayor, &c., of N. Y., *Ante*, 376.
2. It is no defence to an action against a municipal corporation for services actually rendered, upon an employment by one of its agents, ordinarily and apparently having power to employ such services, that an appropriation required by law to be made in advance, had not in fact been made; or that, having been made, it had been otherwise expended. *Supreme Ct.*, 1864, Donovan *a.* Mayor, &c., of N. Y., *Ante*, 58.

NEW TRIAL.

1. A verdict contrary to evidence should not be set aside, and a new trial granted, merely to give the plaintiff *nominal* damages. This is a salutary rule to discourage trivial litigation. [18 Johns., 129; 2 Burr., 664.] *Ct. of Appeals*, 1865, Stephens *a.* Wider, 32 *N. Y.*, 351.
2. The rule is uniform, that the court will not set aside the verdict of a jury, unless it is clearly against the weight of evidence. Where the evidence is merely conflicting, a verdict found either way will not be disturbed. *N. Y. Superior Ct.*, 1863, Lewis *a.* Blake, 10 *Bosw.*, 198.
3. After a jury has found that the plaintiff is not entitled to recover any thing, which is equivalent to a finding that the defendant was not guilty of the injury complained of, the case ought not to be sent back for a new trial on account of an incorrect ruling upon the question of damages. *Ct. of Appeals*, 1864, Marcly *a.* Shults, 29 *N. Y.*, 346.
4. Where the defendants, upon the trial, admit that the amount claimed is correct, if any thing be due, the court will not grant a new trial upon the suggestion that the evidence does not warrant the recovery of so large an amount. *N. Y. Superior Ct.*, 1863, Rowe *a.* Smith, 10 *Bosw.*, 268.
5. A general exception to the judge's charge is not available to support an appeal for error in particular portions of it; but special circumstances may make it expedient to grant a new trial for such error. *Supreme Ct.*, 1865, Ryan *a.* The People, *Ante*, 232.

6. The admission of legitimate evidence, though not very material, not ground of disturbing the report of a referee. *Ct. of Appeals*, 1865, Woodruff *a.* McGrath, 32 *N. Y.*, 255.
7. A new trial should not be granted for the admission of improper evidence, where the court cannot see that "the evidence had any bearing upon the issue, and could possibly have had any influence upon the verdict." [1 Duer, 412; 16 Johns., 90; 3 Cow., 618; 1 Comst., 519; 2 Ib., 193.] *Ct. of Appeals*, 1864, Ashley *a.* Marshall, 29 *N. Y.*, 494; affirming S. C., 9 *Ante*, 361.
8. Verdict apparently not in accordance with the truth of the case, not to be set aside unless the case is so flagrant as to show passion, prejudice, or inattention to their duty on the part of the jury. Cothran *a.* Collins, 29 *How. Pr.*, 113.
9. That it is only in case of trials in the Court of General Sessions, in the city of New York, brought up by writ of error, that the appellate court may now grant a new trial, whether any exceptions shall have been taken or not in the court below. *Supreme Ct.*, 1863, Done *a.* People, 5 *Park Cr.*, 364.

NEW YORK (CITY OF).

1. The Common Council of the city of New York have the right to assume a portion of the expense of paving any street in the city, and pay the same out of the city treasury; at least when the paving is of a character to benefit the public rather than the holders of adjacent property. *Supreme Ct.*, 1865, Turfler's Case, *Ante*, 140.
2. Where an assessment is directed to be made upon adjacent property for paving, etc., streets, the city should be charged by the assessors with a proportionate assessment for adjacent public squares, in the same manner as individual owners for their property. *Ib.*
3. The duties of assessors are confined to the execution of the ordinance directing the assessment; they cannot alter or amend it because it may seem to them illegal. *Ib.*
4. Where an ordinance directed a portion of the expense of paving a street to be borne by the city, and an equal portion to be assessed on the adjacent property, and a sum was first charged by the assessors to the city for adjacent parks, and the remainder divided between the city and the adjacent property,—*Held*, erroneous. The whole amount should have been divided between the city and the adjacent owners, and the city assessed among the latter as owner of the parks. *Ib.*

ASSESSMENTS; MUNICIPAL CORPORATIONS.

NONSUIT.

1. A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action, against whom no liability is shown. [Code, § 136, 274; 1 Kern., 294; 2 Ib., 336; 15 Barb., 524; 16 Ib., 33]. *Ct. of Appeals*, 1863, McIntosh *a.* Ensign, 28 *N. Y.*, 169.
2. The true construction of the provisions of the Code of Procedure which alter the common-law rule on this subject, is, that when, in an action upon a joint contract, one or more of the defendants is proven not to be liable, and one or more of the others to be liable, a separate judgment may be given against those who are liable, whether their liability be joint or several, and the other defendants may be dismissed. The test is, whether the plaintiff can recover in the action against any of the defendants if they had been sued alone. *Ib.*
3. In an action for damages for converting plaintiff's personal property and ejecting him from his store, it appeared that the plaintiff made a general assignment for the benefit of his creditors, to the defendant, who was his landlord; and that some time after the assignment, the plaintiff having meanwhile continued in possession, the defendant excluded him from the premises and took possession of all the goods there, claiming that they all passed under the assignment. The plaintiff testified that a part of the goods so withheld from him he had acquired subsequent to the assignment, and that at the time of the eviction he was doing a profitable business.

   Held, upon the evidence in this case, that it was error to nonsuit the plaintiff as to his claim for conversion of the property which he alleged that he had acquired subsequent to the assignment. Price *a.* Murray, 10 *Bosw.*, 243.

DISMISSAL OF COMPLAINT.

NOTICES.

1. An act to legalize notices and other advertisements published in the Albany Evening Journal and the Albany Atlas and Argus, prior to March 7, 1865. *Laws of* 1865, 513, ch. 305.
2. Wherever, by law, any notice is required to be given by the Commissioners of Pilots or by the Board of Commissioners of Pilots, a notice signed by the president for the time being of the board, and containing a copy of the section under or in pursuance of which such notice is given, shall be a

sufficient compliance with the requirements of the law in respect to the giving of such notice; provided the said board shall, by a vote of a majority thereof, within twenty days after the giving of such notice, ratify and adopt the same as the act of said board; but this shall not apply to any notice to be given in the progress of any action or special legal proceedings. *Laws of* 1865, 1424, ch. 712.

NOTICE OF PENDENCY OF ACTION.

A party having notice of the pendency of an action to reach the equitable interest of a judgment debtor in lands, may not purchase them from a person fraudulently holding the legal title, enter upon and improve them; and when the lands are subjected to the claim of the judgment debtor, and his judgment and the costs of the action specifically charged upon them, discharge the lien by payment of a sum of money equal to the price that he agreed to give his grantor, or discharge it by the payment of a sum equal to the value of the lands, without the improvements that he, not innocently or ignorantly, but improvidently and at his peril, put upon them. *Ct. of Appeals*, 1865, Patterson *a.* Brown 32 *N. Y.*, 81.

NOTARIES.

Fees of notaries regulated. *Laws of* 1865, 633, ch. 356.

OFFICERS.

1. The authority of the comptroller of the city and county of New York to make appointments to the office of Commissioner of Taxes and Assessments for the city of New York. People *a.* Woodruff, 32 *N. Y.*, 355.
2. Appointment of Metropolitan Fire Commissioners, and the validity of the statute (1865) authorising it. People *a.* Pinckney, 32 *N. Y.*, 377, 724.
3. Appointment of court clerks, in the judicial districts of the city and county of New York. Harbeck *a.* Mayor, &c., of N. Y., 10 *Bosw.*, 366.
4. The constitution and the laws have conferred upon the governor full jurisdiction in the cases of charges brought against the Mayor, Comptroller, City Inspector, and Corporation Counsel of the city of New York, for misconduct in office. *By the Governor*, In the Matter of Brennan, *Ante*, 376, *note*.
5. The investigation of such charges may be had before the governor,

and the testimony taken before him sworn to, as the power is expressly given by the law, to the governor, to administer an oath whenever an affidavit is required in any proceedings before him. *Ib.*

OYER AND TERMINER.

Of the power of courts of Oyer and Terminer to grant new trials for other causes than the merits. Willis *a.* People, 32 *N. Y.*, 719.

PARTIES.

1. The People of the State, to maintain an action, must show an interest in the subject-matter of the litigation. They cannot maintain an action for the protection of property described by the complaint as belonging to a municipal corporation, without asserting some title or interest therein. *Ct. of Appeals*, 1865, People *a.* Booth, 32 *N. Y.*, 397.
2. All future actions and proceedings by the Commissioners of Pilots to enforce any liability, or to recover any fines, penalties, or forfeitures given by law to such officers, or to the Board of Commissioners of Pilots, may be brought and prosecuted by such officers in the name of the Board of Commissioners of Pilots. *Laws of* 1865, 1424, ch. 712.
3. Under a policy of marine insurance, "issued for account of whom it may concern," the plaintiff may recover for his own interest, although the preliminary proofs fail to show a transfer of a part interest; and *it seems* that he could recover for the interest of both. *Ct. of Appeals*, 1865, Walsh *a.* Washington Ins. Co., 32 *N. Y.*, 427.
4. Where an insurance policy is issued to partners, and afterwards one of the partners releases his interest in the property to the others, and a loss afterwards occurs, the partners to whom the release was given can recover, in their own names, the whole loss under the policy, including not only the interest released, but also any loss to goods bought by them after the release. *N. Y. Superior Ct.*, 1863, Hoffman *a.* Ætna Fire Ins. Co., *Ante*, 325. Affirmed, 32 *N. Y.*, 405.
5. The assignee of a foreign executor may maintain an action in the courts of this State, upon a chose in action transferred to such assignee by such foreign executor. The disability of the foreign executor to sue in our courts does not attach to the subject of the action, but to the person of the plaintiff. *Ct. of Appeals*, 1865, Petersen *a.* The Chemical Bank, 32 *N. Y.*, 21.
6. A recovery can be had against two of several defendants, although the suit and cause of action was upon an alleged joint contract of three. [1 Kern., 294; 5 Duer, 327; 4 Bosw., 192; 21 N. Y., 300.] A re-

lease of the debtor who was not joined, under the joint debtor's act [Laws of 1838, ch. 257], discharges him only, and not the other joint debtors; their liability continues notwithstanding such discharge. *N. Y. Superior Ct.*, 1863, Moss *a.* Jerome, 10 *Bosw.*, 220.

7. Under a will directing a mortgagor to the testator to pay certain legacies amounting to less than the mortgage, and relinquishing the residue of the mortgage;—*Held*, that there being no privity between the mortgagor and the legatees, the executor was the proper party to sue, and might foreclose the mortgage for the amount of the legacies. *Ct. of Appeals*, 1863, Newton *a.* Stanley, 28 *N. Y.*, 61.

8. Where one of several persons, who hold the legal title to real property as tenants in common, is in possession under an agreement by which the others have released their interests, and agreed to convey to him, he may alone maintain an action for an injury to the premises by a third person, and may recover the whole damages. *N. Y. Superior Ct.*, 1863, Sparks *a.* Leavy, *Ante*, 364.

9. In a creditors' suit, the judgment debtors must be made parties by the service of process. It is not enough to name them in the proceedings as defendants. *N. Y. Superior Ct., Sp. T.*, 1862, Monroe *a.* Galveston, &c., R. R. Co., *Ante*, 90.

10. Where a creditors' suit is brought by plaintiffs suing not only on behalf of themselves, but also on behalf of all other creditors of the same debtor who are similarly situated, and shall contribute, &c., such other creditors acquire no vested rights until judgment. The plaintiffs instituting the suit, and the defendants, must be left until judgment to prosecute and defend, without regard to the claims of such other creditors; and the court will not grant an order that the action be deemed prosecuted for their benefit from the commencement, so as to preclude the defendants from claiming a discontinuance by paying the judgment of the original plaintiffs. *N. Y. Superior Ct.*, 1863, Mattison *a.* Demarest, *Ante*, 356.

11. Whether other creditors can come in after judgment, unless executions upon their respective judgments were returned unsatisfied before the commencement of the creditors' suit—*Query? Ib.*

12. In an action for tort, if the plaintiff discovers on the trial that the defendant is a minor, he may, after verdict in his favor, move to strike out the appearance and answer of the defendant, and all subsequent proceedings. *Supreme Ct., Sp. T.*, 1865, Boylen *a.* McAvoy, 29 *How. Pr.*, 278.

13. For a personal injury occasioned by the negligence of several persons, there is a separate liability as well as a joint one, and the person injured may, at his election, sue both or either of the wrong-doers.

There is no rule which makes all the tort-feasors necessary parties to an action of that character. [14 Johns., 426.] *Ct. of Appeals*, 1864, Creed *a.* Hartman, 29 *N. Y.*, 591; affirming S. C., 8 *Bosw.*, 123.

14. Right of a father to maintain action for damages for seduction of adult daughter. Lipe *a.* Eisenlerd, 32 *N. Y.*, 229, 729.

15. A stockholder of a corporation, suing the directors to recover his share of the damages for injury done to the corporation, by the embezzlement of its assets, must make the corporation a party to the action. *N. Y. Superior Ct.*, 1863, Gardiner *a.* Pollard, 10 *Bosw.*, 674.

16. Where the plaintiff in such an action seeks to charge the defendants as trustees, a third person who combined with them in the wrongful acts complained of, cannot properly be made a party defendant. *Ib.*

17. Under section 121 of the Code, the personal representatives of a sole defendant in an action, who dies after judgment and pending an appeal therefrom, have a right to have themselves made parties to the appeal, that they may obtain an affirmance of the judgment; and the proper mode of doing it, by analogy to the former practice, is by a motion to the court in the manner provided for by section 121. *N. Y. Com. Pl.*, 1865, Schuchardt *a.* Remiers, 28 *How. Pr.*, 514.

18. An application, by a stranger to a suit, to be allowed to intervene and be made a defendant, in order that he may litigate the plaintiff's claim, and set up a claim against the original defendants, adverse to and exclusive of that of the plaintiff, is not a matter of strict right, but rests in the discretion of the court. *N. Y. Superior Ct.*, 1862, Scheidt *a.* Sturgis, 10 *Bosw.*, 606.

19. Such an application should be denied, where the applicant is prosecuting a separate action adapted to secure all the relief to which he claims to be entitled. *Ib.*

20. So, too, after he has prosecuted such separate action to a trial upon the merits, an application made by him to have a judgment recovered in the former action set aside, on the ground of fraud and collusion, should not be granted. *Ib.*

ABATEMENT; ATTORNEY AND CLIENT; DEFENCES, 1, 2; EJECTMENT; NONSUIT, 1, 2.

PARTNERSHIP.

A surviving partner is vested with the partnership assets for the purpose of applying them to the payment of partnership debts equitably; and has not power to assign the whole assets to the preference of some

creditors and the exclusion of others. (Per McCunn, J.) Loeschigk *a.* Addison, *Ante*, 169.

PLEADING.

1. Where the law applicable to a case has been altered by the Legislature pending the action, the court will dispose of issues of law arising on a demurrer, according to the law at the time of the trial of the issues, if it does not appear upon the face of the complaint when the action was commenced. [11 Barb., 569; 19 N. Y., 271.] *Buffalo Superior Ct.*, 1864, Lewis *a.* City of Buffalo, 29 *How. Pr.*, 335.
2. An allegation in a pleading, of an amount of unliquidated damages or a value, is not to be taken as true, by an omission to deny it, except to sustain jurisdiction or show the performance of a contract requiring such value, or the like. *N. Y. Superior Ct.*, 1863, Stuart *a.* Binsse, 10 *Bosw.*, 436.
3. In an answer, a defence which merely takes issue on allegations in the complaint, is not demurrable. If the allegations are immaterial, the remedy is by motion. *N. Y. Superior Ct.*, 1864, Maretzek *a.* Cauldwell, *Ante*, 35.
4. This rule applies to averments in a defence pleaded in an action for libel, that the charges contained in the alleged libellous publication were true. Such matter is not new matter, within the meaning of section 153 of the Code. *Ib.*
5. The court will not, without special reasons shown, allow a defendant, after having interposed an answer, to withdraw it and put in a demurrer instead. *N. Y. Superior Ct.*, 1862, Finch *a.* Pindon, *Ante*, 96.
6. If the allegations of a defence are pertinent to the controversy, their sufficiency is only to be tested by demurrer or on the trial. *N. Y. Superior Ct.*, 1863, Carpenter *a.* Bell, *Ante*, 258.
7. A plaintiff in an action who does not demur to an answer therein which sets up as a counter-claim a demand not properly admissible as such in the action, but takes issue upon it by replying thereto, thereby agrees to try in such action the merits of such demand, and to have the result of such trial avail therein, as though such demand were the proper subject of a counter-claim therein, and thus waives any right to object on such trial to the admission of evidence to sustain it. *N. Y. Superior Ct.*, 1863, Ayers *a.* O'Farrell, 10 *Bosw.*, 143.

Amendment, 1; Answer; Defences; Complaint; Counter-claim; Demurrer; Indictment; Libel.

POLICE.

The members of the police force of the Metropolitan Police District, possess in criminal cases all the common-law and statutory powers of constables. They may legally arrest for petit larceny without warrant, upon the oral charge of a third person, provided they have reasonable ground to suspect that the petit larceny had been committed, and that the one arrested was the guilty person. *Supreme Ct.*, 1864, Carpenter *a.* Mills, 29 *How. Pr.*, 473.

POWERS.

1. Where a power, authority, or duty is confided by law to three or more persons (not a court), they must all confer, unless otherwise specially authorized; and if, after entering upon proceedings, one of them resigns his appointment, the others cannot, upon a subsequent meeting, proceed with the exercise of the powers conferred. *Supreme Ct., Sp. T.*, 1865, Beekman's Petition, *Ante*, 244.
2. This rule applies to assessors in street cases in the city of New York. *Ib.* Compare Marble *a.* Whitney, 28 *N. Y.*, 297.
3. Power conferred by statute, in what cases exhausted by once exercising it. People *a.* Woodruff, 32 *N. Y.*, 355.

COURT.

PROCESS.

Process, which has been set aside for irregularity, affords no justification afterwards for acts done under it, to the party in whose favor it was issued. If issued by competent authority, and regular upon its face, it might afford protection to the officer for his acts previously done under it, but none whatever to the party. As to him, it is as though no process whatever had been issued, and the goods had been taken and detained by his order without any process [11 Wend., 31; 12 Johns., 257; 11 Mass. R., 500; 8 Adoll. & Ell., 449; 2 Blackst. 845]. The moment it is set aside, the party becomes a trespasser *ab initio*. *Ct. of Appeals*, 1864, Kerr *a.* Mount, 28 *N. Y.*, 659.

PROHIBITION.

1. A writ of prohibition does not lie to correct irregularities in judicial proceedings, but only to restrain the courts from exceeding their jurisdiction; it should not be issued where there is another and easier remedy. *Supreme Ct.*, 1865, People *a.* Russel, *Ante*, 136.
2. A writ of prohibition, when allowed by a justice out of court, may be quashed on motion at special term, even if returnable at the general term. *Ib.*

PROTEST.

Form of notice of protest of notes: Printed signature sufficient. Bank of Cooperstown *a.* Woods, 28 *N. Y.*, 545, 561.

QUESTIONS OF LAW AND FACT.

1. In an action in which a chattel mortgage is shown to be presumptively fraudulent for want of a change of possession, if evidence is given that it was made in good faith, the question is one of fact for the jury, and their finding may be held conclusive. *Ct. of Appeals*, 1865, Miller *a.* Lockwood, 32 *N. Y.*, 293.
2. A voluntary conveyance of an estate or interest in lands, is not *per se* fraudulent, even as to existing creditors. It is not enough to show that the deed was without consideration, and that the party who seeks to avoid it was a creditor antecedent to or at the time of the transfer. Whether the particular transaction was intended as a fraud upon creditors, is a question of fact. *Ct. of Appeals*, 1865, Dygert *a.* Remerschnider, 32 *N. Y.*, 629.
3. The law not having fixed the rate of speed at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in each case, whether the actual rate was excessive or dangerous. *Ct. of Appeals*, 1864, Wilds *a.* Hudson River R. R. Co., 29 *N. Y.*, 315.
4. Seaworthiness, when a question of fact for the jury, and when a question of law. *Ct. of Appeals*, 1865, Walsh *a.* Washington Ins. Co., 32 *N. Y.*, 427.
5. In what case it is the province of the jury to determine, upon evidence as to the usage of trade, what was the intention of the parties. Pollen *a.* Leroy, 10 *Bosw.*, 38.

6. Question whether the words "carding machine," in a contract, do not mean mill, and include fixtures which had been detached, should be submitted to the jury. *Ct. of Appeals*, 1863, Martin *a.* Cope, 28 *N. Y.*, 180.
7. Question of adverse possession to be submitted to the jury. *Ct. of Appeals*, 1863, Munro *a.* Merchant, 28 *N. Y.*, 9; reversing S. C., 26 *Barb.*, 383.

RECEIVER.

In an action by a mortgagee of chattels, for injury to his reversionary interest therein, caused by a sale thereof, under proceedings against the mortgagee while in possession, the sale having been made by a receiver, at the instance of the party on whose behalf he was appointed, and contrary to his duty under the orders of the court by whom he was so appointed, the omission of the plaintiff to obtain the leave of such court to commence such action, constitutes no objection to the recovery therein against such receiver and party by whose direction such sale was made. *N. Y. Superior Ct.*, 1863, Manning *a.* Monaghan, 10 *Bosw.*, 231.*

RECORDING DEEDS.

That an agreement relating to an interest in a mortgage of lands, and its priority, is not an instrument proper for record; or if it be, it must be recorded as a mortgage, not as a deed. Gillig *a.* Maass, 28 *N. Y.*, 191.

ACKNOWLEDGMENT OF DEEDS; CERTIFICATE.

REFERENCE.

1. The act of 1862 (Laws of 1862, 743, ch. 412)—which authorizes the court to refer controversies, etc., relating to disputed or unpaid demands by receivers of mutual insurance companies against members or stockholders—applies to actions brought since the enactment of the statute, as well as to actions then pending. *Ct. of Appeals*, 1865, Sands *a.* Harvey, *Ante*, 248. To the contrary, *Supreme Ct.*, 1865, Sands *a.* Birch, *Ante*, 255.
2. No compulsory reference can be ordered under section 271 of the Code

* Reversed on other points, 28 *N. Y.*, 585.

of Procedure, unless the examination of a long account be required. *Supreme Ct.*, 1865, Dickinson *a.* Mitchell, *Ante*, 286.

3. A bill of particulars is not an account proper in the legal sense of the term. *Ib.*
4. Five items do not constitute a long account. *Ib.*
5. An order of reference should be made at special term. If made at chambers, it will not support a judgment upon the report of the referee, although, if the defeated party appeared before the referee on the trial, the court might sustain the proceedings by allowing an order of reference to be entered *nunc pro tunc*. *Supreme Ct.*, 1864, Scudder *a.* Snow, 29 *How. Pr.*, 95.

ACCOUNTING, 1; APPEAL, 14.

RELIGIOUS CORPORATIONS.

Religious corporations can only be dissolved by the Legislature. The consent of a majority of the corporators, with the direction and order of the Supreme Court, will not effect a dissolution. *N. Y. Superior Ct.*, 1865, Madison Ave. Bapt. Church *a.* Bapt. Church in Oliver-st., *Ante*, 105.

REMOVAL OF CAUSES.

An indictment in a State court for an offence against the penal laws of the State is not removable by the defendants, on petition, before plea, into the Circuit Court of the United States, under the provision of the act of Congress of 1863 (ch. 84, § 5). Congress has not the power to confer upon the United States courts jurisdiction to try indictments found in the State courts. It is not enough that an act of Congress gives the United States Circuit Court jurisdiction of such a case. It can have no jurisdiction that is not conferred by the constitution as well as by the law. [Explaining 9 Wheat., 821; 3 Dall., 476.] *N. Y. General Sessions*, 1864, People *a.* Murray, 5 *Park. Cr.*, 577. To the same effect in a civil case for damages. Patrie *a.* Murray (*Supreme Ct.*, 1864), 29 *How. Pr.*, 312.

SECURITY FOR COSTS.

A defendant sued by an infant plaintiff, who appears by a *guardian ad litem*, is not entitled to require the guardian to give security for costs. *Supreme Ct.*, 1865, Grantman *a.* Theall, *Ante*, 308.

SENTENCE.

1. A sentence to confinement in the state-prison is necessarily a sentence of imprisonment at hard labor, the statute having prescribed that mode of punishment. *Supreme Ct.*, 1863, Done *a.* People, 5 *Park. Cr.*, 364.
2. Under chapter 110, of the Session Laws of 1853, the magistrates and courts of Kings County are required to send to the penitentiary, instead of the county-jail, all persons convicted before them, who shall be sentenced to imprisonment for a period of not less than thirty days. *Supreme Ct.*, 1860, Dempsy *a.* People, 5 *Park. Cr.*, 85.
3. Proper sentence upon trial and conviction, under the act of 1862, for murder committed while the act of 1860 was in force. McKee *a.* People, 32 *N. Y.*, 239.

SERVICE (AND PROOF OF).

1. Orders for the service of summons by publication made by county judges prior to January 1, 1849, to have the same force as though made by the court, or by a justice of the Supreme Court. *Laws of* 1865, 766, ch. 418.
2. That the written admission of a defendant of the service of a summons and complaint should state that the service was personal, by the delivery of a copy thereof to him, or the clerk has no power or authority to enter judgment under section 246 of the Code. *Ct. of Appeals*, 1863, Read *a.* French, 28 *N. Y.*, 285.

SET-OFF.

1. A demand which has been assigned to assignees for the benefit of creditors is not subject to have set-off against it, in their hands, a demand against the assignors, which was purchased by their debtors, but had not become payable at the time of the assignment. [1 Sandf., 23; 4 Sandf., 604; S. C., on appeal, 5 Seld., 211; 22 N. Y., 489; 2 Bosw., 91; 2 Duer, 78; 3 Comst., 475; 2 Duer, 298.] *N. Y. Superior Ct.*, 1862, Martin *a.* Kunzmuller, 10 *Bosw.*, 16.
2. A debt absolutely assigned to a stranger, pending litigation thereon, and before judgment, cannot, on a motion, be set off against another debt. But in an action such set-off may be allowed. *N. Y. Superior Ct.*, 1864, Pignolet *a.* Geer, *Ante*, 264.
3. At law, set-offs are regulated and controlled by the statute, and both demands must be liquidated by judgment, before a set-off can be heard. But in equity, the statute does not control, and the demands need not be liquidated. *Ib.*

SHERIFF.

1. A sheriff cannot execute a writ or warrant of attachment out of his own county. Where he did so under a mistake as to the boundary of his county, the property attached was ordered to be released. *Supreme Ct.*, 1865, Matter of Tilton, *Ante*, 50.
2. *It seems*, that the sheriff is not bound to permit parties whose books are in his custody under an attachment, to examine them. *N. Y. Superior Ct.*, 1863, McCartan *a.* Van Syckel, 10 *Bosw.*, 694.
3. *It seems*, that the sheriff may assign his rights against bail who have failed to justify, and that the assignee may recover thereon for damages actually accrued to the sheriff. *Supreme Ct.*, 1865, Clapp *a.* Schutt, *Ante*, 121.
4. The Revised Statutes do not imperatively make it the duty of a retiring sheriff to assign over, at the end of his term, to the new sheriff, a debtor taken in execution, who is upon the jail-limits, so as to make the retiring sheriff, if he omits so to do, liable to the judgment creditor in the amount of the debt, as though it were an escape. Such omission will not charge, *prima facie*, the retiring sheriff with the whole debt. *N. Y. Superior Ct.*, French *a.* Willet, 10 *Bosw.*, 566.
5. In an action for damages for such omission, an omission by the plaintiff to cause the prisoner to be retaken, by issuing a second execution to the new sheriff, may be considered in mitigation of the damages. *Ib.*

ATTACHMENT; BAIL, 1.

SHIPPING.

1. Certain liens on vessels under the quarantine and health laws may be enforced by attachment under the act of 1862. *Laws of* 1865, 1210, § 12, ch. 592.
2. In proceedings by the attachment of vessels under the act of 1862, the filing of a specification of the debt previous to applying for the writ, is necessary only where the vessel has left port. *Supreme Ct.*, 1865, Matter of Tilton, *Ante*, 50.
3. The omission to specify the names of the owners of the vessel in the application is not a fatal defect. *Ib.*
4. Clerical defects in the application may be amended upon its presentation. *Ib.*
5. If the undertaking offered do not conform to the statute, it may be amended under the power given by 2 Rev. Stat., 556; and when amended, will be valid from the time of its execution. *Ib.*

SPECIAL PROCEEDINGS.

When, in special proceedings, courts or officers of limited jurisdiction are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications or occupying some peculiar relation to the parties or the subject-matter, such acts, when done by the court or officer, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. [3 Wend., 42; 12 Pick., 572.] *Ct. of Appeals*, 1864, Porter *a.* Purdy, 29 *N. Y.*, 106.

SPECIFIC PERFORMANCE.

1. Where the vendor in an executory contract for the sale of land dies, and the land descends to heirs, some of whom are minors, the remedy of the vendor is by applying to the court for an order for specific performance by the minors, not by a demand of a deed on the contract day. *Ct. of Appeals*, 1863, Tompkins *a.* Hyatt, 28 *N. Y.*, 347.
2. Where an agreement was made between the holders of the first and second mortgage, respectively, upon leasehold property, that the holder of the first mortgage would waive a default, which gave him the right to foreclose it immediately, in consideration that the holder of the second would foreclose his mortgage immediately, and that if he should buy at the foreclosure, he would pay the sum of $3,000 on account of the first mortgage, within six months;—*Held*, that the holder of the first mortgage could sustain an action against the holder of the second mortgage, and a third person, in whose name he was alleged to have bought in the premises at such foreclosure, to have such purchase set aside so far as it prevented specific performance of the agreement; and to have the holder of the second mortgage adjudged to pay the plaintiff $3,000 upon account of the first mortgage. *Supreme Ct.*, 1865, Livingston *a.* Painter, *Ante*, 28.

STAMPS.

A summons issued by a justice of the peace does not require a United States Revenue stamp. Justices' summons, since they do not require a seal, are rather to be regarded as "other original process," than as

writs." *Livingston County Court*, 1865, Baird *a.* Pridmore, 29 *How. Pr.*, 253.

STAY OF PROCEEDINGS.

1. The question, whether a party has complied with the provisions of the Code in giving security to stay proceedings, can only arise upon a motion to set aside the proceedings of the opposite party, taken subsequent to the giving of the security. *Supreme Ct.*, 1865, Dyckman *a.* Valiente, *Ante*, 130.
2. A stay of proceedings, for the purposes of an appeal, is not removed, so as to enable the respondent to issue execution upon the judgment appealed from, by a decision of the appeal announced orally, and entered in the minutes. To supersede the stay, there must be a formal judgment entered by the clerk. *N. Y. Superior Ct.*, 1864, Bowman *a.* Tallman, *Ante*, 84.
3. But the issue of an execution after such decision entered on the minutes, and before the entry of a judgment, is a mere irregularity. *Ib.*
4. A motion to vacate it must be made promptly. Where, after the levy of the execution upon defendant's property, the judgment was entered, and defendant appealed from it to the Court of Appeals,—*Held*, that a motion made several months subsequently was too late. *Ib.*

APPEAL, 15.

STIPULATION.

1. An agreement to pay liquidated damages, in the event that in a suit then pending the court shall fail to make an order with a specified provision affecting substantial interests, is void. If it contemplate an order which would be inequitable or contrary to settled practice, it is against public policy; and even if it contemplate an order, such as is usual to make in like cases, it is in the nature of a wager, and prohibited by the Statute of Betting and Gaming. *N. Y. Superior Ct.*, 1863, Cowdrey *a.* Carpenter, *Ante*, 373.
2. Thus, where a party to a suit for the foreclosure of a mortgage of real property, on assigning a junior mortgage which covered only a part of the same premises, stipulated with his assignee that the order of sale in the foreclosure should direct the property not covered by the junior mortgage to be first sold for payment of the prior mortgage;—*Held*, that the stipulation was void, and the assignee could not re-

cover liquidated damages provided by it, upon its breach, by the making of an order not containing any such provision, and the sale of the whole premises without producing enough to pay the junior mortgage. *Ib.*

3. In a written stipulation entered into during the pendency before a referee, of trials in several actions, it was agreed by one of several plaintiffs and one of several defendants in such actions, that such trials should "proceed at once, be determined with all practicable dispatch, and be fully ended, and judgment entered therein, on or before," a certain day thereafter. Also, in case the judgments in both such actions shall both be in favor of the defendants therein . . as a compromise that such defendant should secure to such plaintiff the payment of a certain sum, by instalments, by giving his bond therefor; and that such plaintiff should pay the costs of such actions, and on payment of the bond, indemnify the defendants therein against the claims on which they were brought, and to transfer to such defendant certain securities and evidences of such claims.

Held, that the entry of such judgments on or before the day fixed in such stipulation in case they were in favor of the defendants, was not a condition precedent to the right to demand the execution of such bond by such defendant. *N. Y. Superior Ct.*, 1862, Gray *a.* Bowen, 10 *Bosw.*, 67.

4. An agreement by a plaintiff, with one of several defendants, that the cause shall be tried without delay, and if the defendants prevail, the defendant entering into the agreement shall pay the plaintiff a certain sum, and receive an assignment of the claims and securities on which the action is brought, is valid. The plaintiff's stipulation to transfer the securities, is a sufficient consideration for the defendant's promise to pay, in the contingency contemplated. Nor is such agreement void on grounds of public policy. *Ib.*

5. The plaintiff having recovered a judgment setting aside a conveyance made by him of certain lots of land, and requiring the defendant to reconvey them to him, the defendant appealed, and executed and deposited with the clerk of the court a deed thereof, as security to abide the event of the appeal; and also stipulated with the plaintiff that any taxes, &c., paid by the latter should be a lien in his favor in case he should not ultimately prevail in the action. The Court of Appeals affirmed the judgment, but directed that the defendant be let in to prove a claim against the plaintiff for services, and that the lands stand as security for such claim, with power to the court below to release all or a part of the lands, or substitute other security, as might be equitable.

Held, that this authorized the court below, pending the further litigation, to release and order to be sold sufficient of the land to repay to the plaintiff the taxes, &c., which had been paid by him. *N. Y. Superior Ct.*, 1863, Mason *a.* Ring, *Ante*, 405.

6. Pending the reference in such case to determine the amount due to the defendant, it is not proper to order another reference to ascertain what amount will probably be allowed him, and to release to the plaintiff so much of the land as is not necessary to secure such probable amount. The amount should be ascertained by prosecuting the first reference; and, meanwhile, the security should not be changed or diminished, unless the plaintiff shows that continuing the existing security is a matter of special prejudice to him. *Ib.*

ATTORNEY AND CLIENT, 5.

SUMMARY PROCEEDINGS.

1. To authorize summary proceedings for the removal of a tenant under the statute, the affidavit must show the existence of the conventional relation of landlord and tenant, and not a tenancy created by the mere operation of law. [5 Wend., 281; 9 Ib., 227; 4 Den., 185; 1 Seld., 383; Crary's Pr., 452.] *Ct. of Appeals*, 1863, People *a.* Simpson, 28 *N. Y.*, 54; affirming S. C., 14 *Abbotts' Pr.*, 457; 37 *Barb.*, 432; 23 *How. Pr.*, 481.
2. Alleging that the defendant, being a lessee, assigned his lease, and by retaining possession, became the tenant by sufferance of the assignee the applicant, is not enough, for this is not the relation contemplated by the statute. *Ib.*

SUMMONS.

SERVICE; STAMPS.

SUPERIOR COURT (OF NEW YORK).

It seems, that in all actions, except those enumerated in sections 123 and 124 of the Code, where there is only a single defendant, he must, to give the Superior Court of the city of New York jurisdiction, reside in the city, or be served with the summons therein. Kerr *a.* Mount, 28 *N. Y.*, 659.

SUPPLEMENTAL PLEADING.

The plaintiff, in an action brought to compel a delivery of stock, and for settlement of an account connected with it, cannot, after a lapse of several years, during which, with knowledge of the facts, he has prosecuted the claim in that aspect, and obtained and acquiesced in a judgment thereon, be allowed to file a supplemental complaint, changing his claim to a demand for damages by reason of a dealing in such stock. *N. Y. Superior Ct.*, 1860, Cheesman *a.* Sturgess, *Ante*, 293.

ABATEMENT, 1, 7, 8; APPEAL, 12; DIVORCE, 3; COUNTER-CLAIM; PLEADING, 7.

SUPPLEMENTARY PROCEEDINGS.

1. In proceedings supplementary to execution against a judgment debtor under the Code of Procedure, the creditor is entitled to have a receiver appointed, although the only property discovered is such as might be sold on execution. Such proceedings are unlike a creditor's bill in the late chancery practice, as authorized by the Revised Statutes; the latter having been used in aid of theexecution to compel a discovery of the debtor's property which could not be reached by execution. The proceeding under the Code is not only to compel a discovery of the debtor's property, but to require its application to the payment of the judgment. The order for the application of property, under section 297, does not extend to property not capable of manual delivery, and is a remedy cumulative merely with the appointment of a receiver. *N. Y. Superior Ct.*, 1862, Heroy *a.* Gibson, 10 *Bosw.*, 591.
2. The appointment of a receiver in supplementary proceedings is not the final step which terminates the power of the judge before whom such proceedings are had, so that his jurisdiction is then at an end. After the debtor has been examined, and the receiver appointed, and the order filed with the testimony, the judge may require the debtor to answer further. *Supreme Ct., Sp. T.*, 1865, People *a.* Meade, 29 *How. Pr.*, 360.

SUPREME COURT.

1. There is but one Supreme Court, whether in general or special term, and either branch is the Supreme Court within the meaning of the

statute relating to street cases in New York, and may exercise all the powers of that court. *Supreme Ct., Sp. T.*, 1865, Matter of Seventh Avenue, 29 *How. Pr.*, 180.

2. The power of the Supreme Court over the real estate of a religious corporation is limited to the sale thereof, and does not extend to authorize a gift or surrender of such property. *N. Y. Superior Ct.*, 1865, Madison Ave. Bapt. Church *a.* Bapt. Church in Oliver-st., *Ante*, 105.

SURROGATES' COURTS.

1. An order made by a surrogate, granting leave to issue an execution against an executor, by 2 Rev. Stat., 116, § 21, cannot be reviewed on appeal, unless the appellant gives security for the payment of the full amount directed to be levied, with interest and the costs of appeal. *Ct. of Appeals*, 1865, Mitchell *a.* Mount, *Ante*, 1.
2. *It seems*, that even if such security be given, the order cannot be reviewed in respect to the sufficiency of the assets. *Ib.*
3. In an action upon an administration bond, to recover upon the administrator's disobedience of an order of the surrogate, requiring payment of a debt, etc., of the intestate, the plaintiff must show that an application was made by the creditor, and that a citation was issued thereupon, and either the fact of the service of such citation, or the proof of its service, which was presented before the surrogate. *N. Y. Superior Ct.*, 1863, Behrle *a.* Sherman, 10 *Bosw.*, 292.
4. If the surrogate's jurisdiction of the person be thus shown, his decree must be treated, in such a collateral action, as valid, though no evidence be given that he, in fact, received proof of the claim of the creditor applying, and of the condition and applicability of the assets. [4 Bosw., 379.] Even if no proof of the claims of the alleged creditors was taken by the surrogate, his decree cannot be avoided collaterally for that cause. If it could be, then it would not be enough to prove that witnesses were sworn and examined before the surrogate, without showing, in addition, that the testimony related to the matter before him, and presented something for the judicial mind to consider, and this would be virtually retrying the proceeding on its merits in a collateral action. *Ib.*
5. In most, if not all, cases of appeals from the decisions of surrogates, the whole case is to be examined by the appellate court, as well upon the facts as upon the law, so far as questions are presented by the appeal; and this rule applies as well to the Court of Appeals as to the Supreme Court. [22 N. Y., 420; 23 Ib., 90; 21 How., Pr., 211.] *Ct of Appeals*, 1864, Robinson *a.* Raynor, 28 *N. Y.*, 494.

TRIAL.

1. Meaning of the term "trial," as used in the Code of Procedure. Mora *a.* Great Western Ins. Co., 10 *Bosw.*, 622.
2. A party has not a right to object to the trial of a cause being had before the judge presiding at the circuit, for the reason that he had tried the cause on a former occasion. The practice of retrying causes before the same judge who presided at the first trial has continued from the time of the organization of the Supreme Court. *Ct. of Appeals*, 1863, Fry *a.* Bennett, 28 *N. Y.*, 324.
3. It is not necessary that a prisoner charged with felony should plead not guilty. It is enough for him to demand a trial. [2 Rev. Stat., 611, 2d ed.] And this demand to be tried may be by acts, or words, or both. *N. Y. General Sessions*, 1838, People *a.* Frost, 5 *Park. Cr.*, 52.
4. Where a person arrested on a charge of a minor offence—*e. g.* petit larceny—demands, in writing, a trial before the Special Sessions, he thereby waives a trial by jury. *Supreme Ct.*, 1863, People *a.* Riley, 5 *Park. Cr.*, 401.
5. The statutes which provide that if a prisoner is not brought to trial, in certain cases, before the end of the next term, etc., after indictment found, he shall be entitled to his discharge [3 Rev. Stat., 5 ed., 1029, 1030], does not entitle a prisoner to be discharged on *habeas corpus* on account of such delay. The statute is not a statute of limitations, but is intended to regulate the practice merely, and a failure to comply is an irregularity merely. *Supreme Ct., Sp. T.*, 1860, People *a.* Rulloff, 5 *Park. Cr.*, 77.
6. It is a good ground of challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court at their request, without any order having been entered requiring such jurors to serve. *Supreme Ct.*, 1862, McCloskey *a.* People, 5 *Park. Cr.*, 308.
7. The statute (*Laws of* 1858, ch. 332, § 1), providing that "on any trial for an offence punishable by death, etc., the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial," is constitutional. The constitution of 1846, in preserving the right of trial by jury in all cases in which it had been theretofore used, does not limit or restrict the authority of the Legislature, except as to the particular right guarantied. The subject of peremptory challenge has always been under legislative control, and if it were a

right given by common law, the legislative will could regulate it. *Ct. of Appeals*, 1865, Walters *a.* People, 32 *N. Y.*, 147; affirming S. C., 18 *Abbotts' Pr.*, 147.

8. Where a juror has conscientious scruples against finding a party guilty of an offence punishable with death, he may be challenged for principal cause by the people. [2 Rev. Stat., 734, § 12.] So where a juror states that he is unwilling to be sworn in such a case, because of such scruples, it is a sufficient ground for such challenge. *Ib.*

9. Mode of determining a challenge of a juror for favor, in a capital case, where conscientious scruples against the death-penalty are alleged. Lowenberg *a.* The People,* 5 *Park. Cr.*, 414.

10. In impannelling a jury for the trial of a felony at the Oyer and Terminer in the county of Kings, it is not erroneous for the court, after failing to get a jury from the thirty-six jurors summoned for the first six days of the court, under the act of April 17, 1858, applicable to that county, to refuse to summon talesmen, and to proceed to complete the jury from the thirty-six jurors summoned for the next six days of the court. *Supreme Ct.*, 1861, Lambertson *a.* People, 5 *Park. Cr.*, 200.

11. The object of an arraignment of a defendant is to establish his identity. It is a valid arraignment, if the defendant is put to the bar of the court to answer, and that, when so brought up, he holds up his hand, and, by subsequent acts, also, admits his identity. *N. Y. General Sessions*, 1838, People *a.* Frost, 5 *Park. Cr.*, 52.

12. The general rule is, that the party who has the affirmative of the issue has the right to open and close the case. But to this there are exceptions, which are subject to the discretion of the judge who tries the cause. Where the action is one sounding in damages, in which it is proper for the plaintiff to give evidence to enhance the damages, the usual course is to allow the plaintiff to begin and close the trial. [1 Phil. Ev., Edw. ed., 818–820.] The recent decisions seem to regard the question, as to which party shall open the case, as one of practice, to be regulated by the discretion of the judge, and that his decision upon it is not a subject of exception. *Ct. of Appeals*, 1863, Fry *a.* Bennett, 28 *N. Y.*, 324.

13. A request made by counsel to the court, to consider him as excepting to each question to be asked a witness, is too general to be available. Each exception should be distinctly taken, and separately in-

* The judgment was affirmed in the Court of Appeals (37 *N. Y.*, 336), but without passing on this question.

corporated in the bill of exceptions. *Supreme Ct.*, 1862, Jefferds *a.* The People, 5 *Park. Cr.*, 522.

14. If an offer of evidence contains any matter not admissible as evidence, the whole may be rejected. *Ct. of Appeals*, 1863, Hosley *a.* Black, 28 *N. Y.*, 438.

15. Upon a criminal trial, the court will not compel the prosecuting officer to call a person as a witness, so as to give the defendant the benefit of a cross-examination. In this country, prosecutions are conducted by sworn officers of the State, and the courts will not interfere in their management of the cases presented, upon the presumption that no wrong will be perpetrated by a public officer. *Oyer & T.*, 1857, People *a.* Fitzpatrick, 5 *Park. Cr.*, 26.

16. When a request to charge contains two propositions, one of which is right, and the other wrong, it is not error in the court to refuse to charge as requested. *Supreme Ct.*, 1862, Tomlinson *a.* People, 5 *Park. Cr.*, 313.

17. That mere irrelevant matter in the charge is not ground for granting a new trial. *Supreme Ct.*, 1863, Done *a.* People, 5 *Park. Cr.*, 364.

18. Proper terms of charge in reference to carrying weapons. Vohl *a.* People, 5 *Park. Cr.*, 410.

19. How far it is advisable for a judge to refer to the facts of the case, must depend on his discretion. It is not error to comment upon them, or even to give his theory in regard to such facts as are proven. *Supreme Ct.*, 1862, Jefferds *a.* The People, 5 *Park. Cr.*, 522.

20. A charge to the jury, that "in a clear case of guilt, where a man is caught in the act of the commission of a crime, good character is no shield and protection; good character is only a shield and protection where it is interposed in doubtful cases;"—*Held*, erroneous where the evidence was of doubtful character. *Supreme Ct.*, 1865, Ryan *a.* The People, *Ante*, 232. See also Lowenberg *a.* The People,* 5 *Park. Cr.*, 414.

21. The court may direct a jury, whose verdict is merely informal, to retire and say under which count of the indictment they found the defendant guilty. Until the verdict is rendered and recorded, and the jury have separated so far as no longer to constitute a jury, they have a right to modify the verdict that they may have given, and declare the truth according to their judgment. That only is the verdict

* The judgment in this case was affirmed in the Court of Appeals (27 *N. Y.* 336), without, however, passing on this question.

which, while they are a jury, is their final and definitive agreement. [7 Johns., 33.] *Supreme Ct.*, 1860, People *a.* Graves, 5 *Park. Cr.*, 134.

22. A verdict that the prisoners are "guilty of the offence charged in the indictment," is equivalent to a general verdict of guilty; and where such a verdict is rendered on an indictment charging several offences, the court may pass judgment on the count charging the highest grade of offence. [Whart. Cr. Law, 1037, § 3048; 12 Serg. & Rawle, 191.] *Ct. of Appeals*, 1860, Conkey *a.* People, 5 *Park. Cr.*, 31.

23. The rendering of a general verdict by a jury, and its reception by the court without objection, either by the judge or the parties, is good, notwithstanding the failure of such jury to find upon certain special questions of fact, upon which the court, in the course of its charge, directed them to find. *N. Y. Superior Ct.*, 1863, Moss *a.* Priest, *Ante*, 314.

24. Where the court instructed the jury, if they render a general verdict, to find also upon particular questions of fact by their answers in writing, and the jury render such general verdict, but make by their foreman merely oral replies to such questions, every party who does not object at the time waives his right, if any, to have written answers made to such questions; while the court, by receiving such general verdict, without insisting upon written answers signed by the jurors, must be deemed also to have withdrawn the instruction to answer such questions, so that the general verdict stands unaffected by any oral answers given by the jury to such questions. *Ib.*

25. Where, in such a case, an application is made by either party to have the answers as actually given by the foreman inserted in the record, the adverse party, if he has done no act to waive the objection to the mode of answering not being in writing, may show that the answers actually given by the foreman were not those which the jury intended. Any amendment, if allowed, should be only to conform the whole finding of the jury, including the general verdict, to the answers intended, and not to those erroneously given by the foreman. *Ib.*

26. An indictment for manslaughter in the second degree, charged the killing of the quick child of M. A. B., by instruments used on her body, for the purpose of procuring an abortion. The jury found the prisoner not guilty of manslaughter in the second degree, but guilty of a misdemeanor, in employing instruments and other means "upon the person of a pregnant woman, with intent thereby to procure the miscarriage of such woman."

Held, that the verdict was defective, in not finding that the offence was committed upon the person named in the indictment, and the

judgment rendered thereon must, for that reason, be reversed. *Supreme Ct.*, 1862, Cobel *a.* People, 5 *Park. Cr.*, 348.

27. The court will not entertain an application for judgment on a verdict taken subject to the opinion of the court at general term, upon a case where there is a disputed question of fact, and exceptions were taken to the exclusion of evidence. Such trial is a mistrial. The court below should, in such case, have directed the cause to be heard upon the exceptions in the first instance at general term, if the questions ought first to have been determined there. *N. Y. Superior Ct.*, 1864, Purchase *a.* New York Exchange Bank, 10 *Bosw.*, 564.

28. Where on the trial of an indictment for manslaughter in the fourth degree, which lasted several days, the jurors were allowed to separate by consent of parties,—*Held*, that after a verdict of guilty, the judgment should not be arrested on affidavits proving expressions used by one of the jurors, both before and during the trial, tending to show bias against the defendant, which affidavits were fully met and repelled by the affidavit of the juror assailed; and where, during the whole trial, the jury appeared to be attentive, patient, and exemplary. *N. Y. Gen. Sess.*, 1838, People *a.* Prost, 5 *Park. Cr.*, 52.

29. An act in relation to the appointment of a phonographic reporter to the City Court of Brooklyn. *Laws of* 1865, 291, ch. 170.

DISMISSAL OF COMPLAINT 1–4; NONSUIT; QUESTIONS OF LAW AND FACT; WITNESS.

TRESPASS.

ACTION, 4; COURT OF SESSIONS.

TRIBUNAL OF CONCILIATION.

The act to establish a tribunal of conciliation in the sixth judicial district,—repealed. Proceedings may be transferred to the Supreme Court. *Laws of* 1865, 556, ch. 336.

TRUST.

Though the relation of trustee and *cestui que trust* does not strictly exist between parties, yet their relation to each other, and the subject-matter of the transaction, may be such as to require the fullest disclosure of facts known by one party, to preclude the presumption of fraud. *Supreme Ct., Sp. T.*, 1865, Carpenter *a.* Danforth, *Ante*, 225.

VAGRANCY.

COMMITMENT, 13.

VARIANCE.

1. The technical rule undoubtedly is, that under a complaint setting out a contract and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible. [1 Kern., 25.] But this rule is of very little consequence; for the plaintiff may amend his complaint, and then give the evidence. [Code, § 173; 15 How. Pr., 399.] It is true that he must submit to such terms "as may be proper;" but terms are not often imposed, for they are seldom necessary in the furtherance of justice. Per BALCOM, J. *Ct. of Appeals*, 1863, Hosley *a.* Black, 28 *N. Y.*, 438.
2. Under a complaint describing a promissory note sued on as made by Orrin North, as note made by a firm doing business under that name, is admissible. *Ct. of Appeals*, 1863, Bank of Cooperstown *a.* Woods, 28 *N. Y.*, 545.

WAIVER.

ANSWERS, 13, 14; APPEAL, 18, 19; EXCEPTIONS, 11; TRIAL, 4.

WARRANT.

A warrant of commitment, issued by a justice of the peace under part iv., ch. 2, tit. 1, § 5, of the Revised Statutes, is valid without a seal. The provision of the statute that all process issued by a justice of the peace may be under seal or without seal, is not to be restricted to civil process. *Supreme Ct.*, 1864, Gano *a.* Hall, 5 *Park. Cr.*, 651.

COMMITMENT; FORMS, 16.

WITNESS.

1. Prosecutor in indictment for fraud, competent to prove that he relied on the representations. [See 13 Wend., 87.] *Buffalo Superior Ct.*, 1860, People *a.* Sully, 5 *Park. Cr.*, 142.
2. On the trial of an indictment for a personal injury by a husband to

his wife, the wife is a competent witness in behalf of her husband. [6 Ala., 685.] *Oyer & T.*, 1857, People *a.* Fitzpatrick, 5 *Park. Cr.*, 26.

3. Competency of an accomplice. People *a.* Cook, 5 *Park. Cr.*, 351.

4. In an action for a tort, tried in 1854, how far each defendant was, under the provisions of the Code then in force, a competent witness for his co-defendant. Wilson *a.* Elwood, 28 *N. Y.*, 117.

5. One who conveys the title to lands with a design to give testimony for the grantee, in an expected controversy, is not incompetent as a witness, however strongly the circumstances may operate against his credibility. [16 Johns., 110; 16 Wend., 460.] The case is not within the provisions of § 399 of the Code, which forbids an assignor of a thing in action to testify on behalf of a person claiming title through him, where the other party to the contract is not living. The conveyance of land is not an assignment of "a thing in action or contract." [2 Bl. Com., 397; 1 Chitty's G. Pr., 99, note p.; 4 Denio, 82; 25 Barb., 597.] *Ct. of Appeals*, 1864, Beach *a.* Cooke, 28 *N. Y.*, 508.

6. Competency of witness to testify to general character. Conkey *a.* People, 5 *Park. Cr.*, 31.

7. If one jointly indicted with others is not tried with them, he is competent as a witness upon their separate trial, notwithstanding he is included in the indictment. The correct rule as to the admissibility of accomplices is this: When the persons indicted are all put on trial together, neither can be a witness for or against the others; but when they are tried separately, though jointly indicted, the people may call those not on trial, though not convicted, or acquitted, or otherwise discharged, with the permission of the court; but they cannot be called as witnesses for each other, though separately tried, while the indictment is pending against them. If acquitted, they may be examined, and even if convicted, unless it be for a crime which disqualifies, and then sentence must have followed the conviction. When all are tried together, if the People desire to swear an accomplice, he must in some way be first discharged from the record. [2 Russ. on Cr., 956, 957; 1 Greenl. on Ev., 506, § 363, p. 524, § 379, and cases in notes; Barb. Cr. L., 2d ed., 425.] *Supreme Ct.*, 1860, Nixon *a.* People, 5 *Park. Cr.*, 119.

8. In case of the separate trial of prisoners jointly indicted, an application to the court, by motion, that the one not on trial be admitted as a witness, is not essential, although his admission rests in the discretion of the court. *Ib.*

9. When it appears that a witness has sworn differently upon the same point on a former occasion, he is not to be pronounced by the judge to be incompetent, and his testimony stricken out, and wholly excluded from consideration, as though he had been convicted of a crime rendering him incompetent to testify as a witness; but the testimony should remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject also to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence. *Ct. of Appeals*, 1864, Dunn *a.* People, 29 *N. Y.*, 523.

10. A witness was asked: "What was the state of the accounts between the plaintiff and your firm at the time of giving the mortgage?" The answer was: "He was indebted to us about $160: I ascertain this from our books." *Held*, that an objection that this evidence was admissible was not tenable. It was not necessary to produce the books of the firm to qualify the witness to answer the interrogatory. *Ct. of Appeals*, 1863, Lewis *a.* Palmer, 28 *N. Y.*, 271.

11. The court in which a cause is tried, in the exercise of its discretion, may exclude disparaging questions, not relevant to the issue, on the cross-examination of a witness, though put for the avowed purpose of impairing his general credit; and this may be done on the objection of the party, without putting the witness to his claim of privilege. *Ct. of Appeals*, 1865, Great Western Turnpike Co. *a.* Loomis, 32 *N. Y.*, 127.

12. In the exercise of this discretion, such questions should be allowed, when there is reason to believe it may tend to promote the ends of justice; but they may properly be excluded when a disparaging course of examination seems unjust to the witness, and uncalled for by the circumstances of the particular case. *Ib.*

13. On questions of this nature, the decision of the original tribunal is not subject to review, unless in cases of manifest abuse or injustice. *Ib.*

14. An answer to a question put to affect a witness's credibility cannot be contradicted. *Ct. of Appeals*, 1863, Baptist Church *a.* Brooklyn Fire Insurance Company, 28 *N. Y.*, 153; affirming S. C., 23 *How. Pr.*, 448.

15. Where a witness, testifying to matters material to the issues being tried, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge the jury that if they believe the witness has knowingly sworn

falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him. *Ct. of Appeals*, 1864, Roth *a.* Wells, 29 *N. Y.*, 471.

16. Subornation of perjury, and conspiracy therefor. Elkin *a.* People, 28 *N. Y.*, 177.

COMMITMENT; FORMS, ETC., 16.

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